87

Supreme Court, U.S.
FILED

071175 MAR 12 2008

OFFICE OF THE CLERK

(1)

No. -

In The
Supreme Court of the United States

CATHERINE BURKE and MIKAEL ROLFHAMRE,
PETITIONERS,
v.

THE BROOKLINE
SCHOOL DISTRICT,
RESPONDENT.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

DENNIS M. DUGGAN, JR., ESQ.
Counsel of Record
JAMIE N. HAGE, ESQ.
On the Petition
NIXON PEABODY LLP
100 Summer Street
Boston, MA 02110
(617) 345-1000
Attorneys for Petitioners

Blanchard Press, Inc. - Boston, MA 02210 - 617-426-6690

QUESTION PRESENTED

Millions of children in the United States are identified as disabled under the Individuals with Disabilities Education Act ("IDEA") (20 U.S.C. § 1401 et seq.). This IDEA case presents the Court with an ideal opportunity to resolve a split among the federal courts of appeals and to ensure that students who are disabled and resident within the boundaries of the First Circuit do not have radically narrower rights under the IDEA than do students resident within the boundaries of nearly every other federal judicial circuit. The question presented is:

Whether parents of a child who has been identified as disabled under the IDEA can maintain a claim for compensatory damages under the Americans with Disabilities Act (42 U.S.C. § 12132 et seq.) and/or section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) for retaliatory-type conduct against them for their advocacy for their child's rights under the ADA, section 504, and the IDEA.

LIST OF THE PARTIES TO THIS PROCEEDING

All parties in the courts below are named in the caption to this petition.

TABLE OF CONTENTS

Page

I. THE FIRST CIRCUIT NOW STANDS ALONE ON THE IMPORTANT FEDERAL QUESTION WHETHER CLAIMS FOR COMPENSATORY DAMAGES MAY BE BROUGHT UNDER THE ADA AND SECTION 504 WHERE SUCH CLAIMS OVERLAP WITH THE IDEA..... 6

A. There is Conflict on this Issue Between the First and Every Other Circuit That Has Addressed the Issue 6

B. Other Federal Courts of Appeals are Aligned More Closely with the Ninth than with the First Circuit.9

C. This Issue Presents an Important Federal Question. 12

II. THE FIRST CIRCUIT'S DECISION BELOW DIRECTLY CONTRAVERTED BOTH THE PLAIN LANGUAGE OF AND THE CONGRESSIONAL INTENT BEHIND SECTION 1415(l), AND THE COURT SHOULD SETTLE THIS IMPORTANT QUESTION OF FEDERAL LAW..... 13

A. Section 1415(l) of the IDEA Unambiguously Preserves Claims Under the ADA and Section 504 13

B. The First Circuit has Nonetheless Failed to Apply the Plain Language of Section 1415(l) 14

C. The Legislative History of Section 1415(l) of the IDEA Reveals that Congress Intended for the Full Panoply of Remedies under Section 504 and the ADA to be Available to Claimants in IDEA-Related Contexts 15

III. THE FIRST CIRCUIT HAS INTERPRETED THE IDEA AS IMPLIEDLY REPEALING THE ADA AND SECTION 504 IN IDEA-RELATED CONTEXTS, AND THIS APPROACH CONFLICTS WITH DECISIONS OF THIS COURT 20

IV. THE FIRST CIRCUIT'S DECISIONS SO FAR DEVIATE FROM THE USUAL AND ACCEPTED PRACTICE AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWERS 23

CONCLUSION 24

TABLE OF AUTHORITIES

FEDERAL CASES

Board of Education v. Ross, 486 F.3d 267 (7th Cir. 2007) 11

Charlie F. by Neil F. v. Board of Educ., 98 F.3d 989 (7th Cir. 1996) 7

Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837 (1984) 14

Crocker v. Tenn. Secondary Sch. Athletic Ass'n, 980 F.2d 382 (6th Cir. 1992) 7

Diaz-Fonseca v. Puerto Rico, 451 F.3d 13 (1st Cir. 2006) 8, 14, 19, 20, 23

Ellenberg v. New Mexico Military Institute, 478 F.3d 1262 (2007) 12

Espino v. Besteiro, 708 F.2d 1002 (5th Cir. 1983) 16

Great Am Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366 (1979) 21

Heidemann v. Rother, 84 F.3d 1021 (8th Cir. 1996) 7

J.L. v. Ambridge Area Sch. Dist., 2008 U.S. Dist. LEXIS 13451 (W.D. Pa. February 22, 2008) 9

M.P. v. Independent Sch. Dist. No. 721, 439 F.3d 865 (8th Cir. 2006) 10, 11

Mark H. v. Lemahieu, 513 F.3d 922 (9th Cir. 2008) 9

Marvin H. v. Austin Indep. Sch. Dist., 714 F.2d 1348 (5th Cir. 1983) 7

Nieves-Marquez v. Puerto Rico, 353 F.3d 108 (1st Cir. 2003) 7, 20

Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist., 288 F.3d 478 (2nd Cir. 2002) ... 7

Posadas v. National City Bank, 296 U.S. 497 (1936) 20, 21

Powell v. Defore, 699 F.2d 1078 (11th Cir. 1983) 7

Rancho Palos Verdes v. Abrams, 544 U.S. 113 (2005) 20, 21

S.W. v. Warren, 528 F. Supp. 2d 282 (S.D.N.Y. 2007) 10

Sellers v. School Bd., 141 F.3d 524 (4th Cir. 1998) 7

Smith v. Cumberland Sch. Comm., 703 F.2d 4 (1st Cir. 1983) 15

Smith v. Robinson, 468 U.S. 992 (1984) ... 15, 16

W.B. v. Matula, 67 F.3d 484 (3d Cir. 1995), overruled on other grounds by A.W. v. Jersey City Public Schools, 486 F.3d 791, 797-98 (3d Cir. 2007) 9

Winkelman v. Parma City Sch. Dist., 550 U.S. __, 127 S. Ct. 1994 (2007) 13

Witte v. Clark County Sch. Dist., 197 F.3d 1271 (9th Cir. 1999) 7

STATUTES

20 U.S.C. § 1400 et seq. 3

20 U.S.C. § 1401 et seq. i

20 U.S.C. § 1415 15

20 U.S.C. § 1415(1) 2, 6, 19, 25

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 ..... 3, 5

29 U.S.C. § 794 ..... i, 2, 3, 4, 6, 25

42 U.S.C. § 1983 ..... 2, 4, 19, 25

42 U.S.C. § 12132 25

42 U.S.C. § 12203 ..... 4, 6, 25

MISCELLANEOUS

Office of Special Education Program, U.S. Department of Education, 27th Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act, Vol. 1, (2005) 12

Marking the Progress of IDEA Implementation: The Study of State and Local Implementation and Impact of Individuals with Disabilities Education Act, Report to the Office of Special Education Programs, U.S. Department of Education (April 2006) 12

131 Cong. Rec. S10397-10398 18

132 Cong. Rec. H4842-43 17

TABLE OF APPENDICES

Appendix A: Judgment of the United States Court of Appeals for the First Circuit affirming the United States District Court for the District of New Hampshire, dated December 13, 2007

Appendix B: Order of the United States District Court for the District of New Hampshire denying plaintiffs' motion for reconsideration, dated March 15, 2007

Appendix C: Order of the United States District Court for the District of New Hampshire, dismissing plaintiffs' claims dated January 29, 2007

Appendix D: Relevant statutes and regulations

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The order of the United States Court of Appeals for the First Circuit was entered on December 13, 2007. It is reprinted in Appendix A. The order of United States District Court for the District of New Hampshire denying the motion for reconsideration was entered on March 15, 2007. It is reprinted in Appendix B. The order of the United States District Court for the District of New Hampshire granting the defendant's motion to dismiss plaintiffs' claims was entered on January 29, 2007. It is reprinted in Appendix C.

STATEMENT OF JURISDICTION

The order of the United States Court of Appeals for the First Circuit sought to be reviewed was entered on December 13, 2007. The statutory provision that confers jurisdiction on the Supreme Court to review a judgment of a federal court of appeals on a writ of certiorari is 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND REGULATIONS

The statutory provisions and regulations relevant to this case and set forth verbatim in Appendix D are:

The Individuals with Disabilities Education Act, 20 U.S.C. § 1415(l)

42 U.S.C. § 1983

The Rehabilitation Act of 1973, 29 U.S.C. § 794

The Americans with Disabilities Act, 42 U.S.C. § 12132

The Americans with Disabilities Act, 42 U.S.C. § 12203

STATEMENT OF THE CASE

Basis for Jurisdiction in the First Instance

The United States District Court for the District of New Hampshire, pursuant to 28 U.S.C. § 1291, exercised subject matter jurisdiction over plaintiffs' claims that they were retaliated against, coerced, and intimidated, in violation of certain provisions in Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) and the Americans with Disabilities Act (42 U.S.C. § 12132 et seq.), by the Brookline School District because of plaintiffs' advocacy on behalf of their children, who were identified as disabled under the Individuals with Disabilities Education Act (20 U.S.C. § 1400 et seq.).

Factual Background

Petitioners Catherine Burke and Mikael Rolfhamre (sometimes, the "Parents") are the parents of three children identified by the Brookline School District (the "School District") as students in need of special education under the Individuals with Disabilities Education Act ("IDEA") (20 U.S.C. § 1400 et seq.). Each of the children is also an individual with a disability under the Americans with Disabilities Act ("ADA") (42 U.S.C. § 12132 et seq.) and a handicapped person as defined by section 504 of the Rehabilitation Act of 1973 ("Section 504") (29 U.S.C. § 794).

In their pro se complaint, Parents alleged that on numerous occasions the School District coerced, intimidated, interfered with, and retaliated against Parents while Parents were engaged in educational advocacy on behalf of their children. Parents alleged that the School District: denied procedural safeguards guaranteed by the ADA and Section 504; interfered with Parents' ability to exercise rights secured by the ADA and their right to assist their disabled children in obtaining and enjoying rights secured by both the ADA and Section 504; interfered with access to dispute resolution procedures required by Section 504; and retaliated against them by spreading false and damaging rumors, making excessive and indeed oppressive demands for medical and mental health records, and imposing policies to limit access to independent evaluators.

Procedural Background

Catherine Burke and Mikael Rolfhamre filed a pro se complaint in this matter in the United States District Court for the District of New Hampshire on August 25, 2006. In their complaint, they set forth claims under Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794), the Americans with Disabilities Act, (42 U.S.C. § 12203), and 42 U.S.C. § 1983, among others. The claims sought compensatory damages to remedy the harm caused by the Brookline School District's acts of coercion, intimidation, interference and retaliation against the plaintiffs for plaintiffs' advocacy on behalf of their daughters, each of whom is identified as a student with disabilities under the IDEA.

The United States District Court for the District of New Hampshire granted the School District's motion to dismiss for failure to state a claim on January 29, 2007.

Parents then moved for reconsideration on February 12, 2007. On March 15, 2007, the District Court denied the motion for reconsideration.

Notice of Appeal was timely filed on April 12, 2007, pursuant to Federal Rule of Appellate Procedure 4(a)(1), by which plaintiffs appealed from the final judgment of the District Court. The First Circuit had appellate jurisdiction over the appeal pursuant to 28 U.S.C. § 1291, as an appeal as of right from a final judgment of a United States District Court. Appellants filed an appeal on July 20, 2007.

The First Circuit affirmed the District Court's dismissal December 13, 2007.

REASONS FOR GRANTING THE PETITION

The First Circuit Court of Appeals (the "First Circuit") has parted company with its sister circuits while neglecting the plain language of section 1415(l) of the Individuals with Disabilities Education Act ("Section 1415(l)") (20 U.S.C. § 1415(l)). Even though Section 1415(l) contains a savings clause that expressly states that the passage of the IDEA in no way restricts claimants' rights under, inter alia, section 504 of the Rehabilitation Act of 1973 ("Section 504") (29 U.S.C. § 794) and the Americans with Disabilities Act ("ADA") (42 U.S.C. § 12203), the First Circuit has held that claimants may not recover compensatory damages under these provisions where the "essence of the claim" is one stated under the IDEA.

I. THE FIRST CIRCUIT NOW STANDS ALONE ON THE IMPORTANT FEDERAL QUESTION WHETHER CLAIMS FOR COMPENSATORY DAMAGES MAY BE BROUGHT UNDER THE ADA AND SECTION 504 WHERE SUCH CLAIMS OVERLAP WITH THE IDEA.

A. There is Conflict on this Issue Between the First and Every Other Circuit That Has Addressed the Issue

This proceeding involves a question of exceptional national importance on which the First Circuit has staked out an untenable position. The First Circuit is a true outlier on this issue: Of the

eleven federal courts of appeals, it is the only one that has ruled that compensatory damages available under the ADA and Section 504 are precluded in IDEA–related contexts.[1] Because cases brought

---

[1] This issue is distinct from the question whether the IDEA (or its predecessor, the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773) (1975) (referred to by courts variously as "EAHCA," "ECHA," or "EHA")) itself provides for compensatory damages. Courts that have considered this question have uniformly determined that the IDEA bars such damages. See, e.g., Nieves-Marquez v. Puerto Rico, 353 F.3d 108, 125 (1st Cir. 2003) (concluding money damages not available under the IDEA because "IDEA's primary purpose is to ensure [a free appropriate public education], not to serve as a tort-like mechanism for compensating personal injury"); Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist., 288 F.3d 478, 483-86 (2nd Cir. 2002) (concluding monetary damages not available under the IDEA); Sellers v. School Bd., 141 F.3d 524, 526-28 (4th Cir. 1998) (holding "tort-like damages" unavailable under the IDEA because they are "inconsistent with IDEA's statutory scheme" and "present acute problems of measurability"); Marvin H. v. Austin Indep. Sch. Dist., 714 F.2d 1348, 1356-57 (5th Cir. 1983) (holding damage remedy not "generally consistent" with goals of IDEA predecessor); Crocker v. Tenn. Secondary Sch. Athletic Ass'n, 980 F.2d 382, 386-87 (6th Cir. 1992) (holding "appropriate relief" under EHA includes restitutionary types of relief but not general damages for emotional injury or injury to a dignitary interest); Charlie F. by Neil F. v. Board of Educ., 98 F.3d 989, 991 (7th Cir. 1996) (holding money damages not available under the IDEA); Heidemann v. Rother, 84 F.3d 1021, 1033 (8th Cir. 1996) (holding general and punitive damages not available under the IDEA); Witte v. Clark County Sch. Dist., 197 F.3d 1271, 1275 (9th Cir. 1999) (holding "ordinarily monetary damages are not available under [the IDEA]"); Powell v. Defore, 699 F.2d 1078, 1081 (11th Cir. 1983) (recognizing "[a]s a general rule, compensatory damages are not available under the [EHA]").

under the statutes at issue in this petition are legion and because the rights protected by the statutes are of such fundamental importance, resolution of this circuit split is therefore imperative.

While it is well-settled that parties may not seek damages for denial of a so-called "free appropriate public education" ("FAPE") under the IDEA, the reach of the First Circuit's affirmance of the District Court's grant of dismissal in this matter extends far beyond this broadly accepted position. The First Circuit's affirmance reveals that it will apply its holding from Diaz-Fonseca v. Puerto Rico, 451 F.3d 13 (1st Cir. 2006) to bar a parent of a child identified as disabled under the IDEA from seeking compensatory damages under Section 504 or the ADA on the theory that such damages are based on denial of FAPE, even if those damages are, as here, for retaliation, coercion, interference and intimidation based on the pursuit of FAPE and of rights provided under Section 504 and ADA.

If it is allowed to stand, the First Circuit's holding in Diaz-Fonseca will allow school districts to retaliate against and otherwise harass parents of IDEA-disabled children with impunity, secure in the knowledge that they cannot – by law – be liable for compensatory damages.

By stark contrast, the Ninth Circuit Court of Appeals – the circuit most directly at odds with the First Circuit – recently held that "the availability of relief under the IDEA does not limit the availability

of a damages remedy under" Section 504. Mark H. v. Lemahieu, 513 F.3d 922, *9 (9th Cir. 2008).

B. Other Federal Courts of Appeals are Aligned More Closely with the Ninth than with the First Circuit.

Other federal courts of appeals have adopted approaches much more akin to that developed in the Ninth Circuit than to the First Circuit.

The United States Court of Appeals for the Third Circuit (the "Third Circuit") has long-endorsed an approach to the availability of compensatory damages under Section 504 for IDEA-related conduct that is consistent with that articulated by the Ninth Circuit in Mark H. In Matula, the Third Circuit reversed a summary judgment holding by a district court that would have barred recovery of damages awarded to a plaintiff parent by an administrative law judge as part of a settlement of claims. W.B. v. Matula, 67 F.3d 484, 494 (3d Cir. 1995), overruled on other grounds by A.W. v. Jersey City Public Schools, 486 F.3d 791, 797-98 (3d Cir. 2007). The court concluded that the plaintiffs could "seek monetary damages directly under § 504." 67 F.3d at 494.

The Third Circuit's ruling in Matula has been relied upon for numerous adjudications of Section 504 claims for compensatory damages separately from IDEA claims. See, e.g., J.L. v. Ambridge Area Sch. Dist., 2008 U.S. Dist. Lexis 13451, *45-46 (W.D. Pa. February 22, 2008) ("Plaintiffs need not allege any new facts aside from those previously litigated in the IDEA administrative proceedings to establish a

violation of section 504, as long as those facts state a prima facie case").

In the Second Circuit, courts routinely analyze Section 504 claims distinctly from IDEA claims, even if both claims rely on the same locus of FAPE-related facts. For example, in See, e.g., S.W. v. Warren, 528 F.Supp.2d 282, *14-15 (S.D.N.Y. 2007), the court stated:

> [C]ourts have considered Section 504 claims in conjunction with IDEA claims and determined that plaintiffs can rely on Section 504 to claim that they are denied access to a free appropriate education, . . . if they can show that defendants acted with bad faith or gross misjudgment in the administration of disability services. . . . Indeed, if the very fact that plaintiffs were challenging the denial or inadequacy of disability services meant they could not assert a Section 504 claim, then there would be no need for courts to distinguish Section 504 claims from IDEA claims. As we discuss below, this is not the case, and courts on numerous occasions have recognized both claims.

Id. (discussing Rothschild v. Grottenthaler, 907 F.2d 286, 289-90 (2d Cir. 1990) and Cushing v. Moore, 970 F.2d 1103 (2d Cir. 1992))

The United States Court of Appeals for the Eighth Circuit, too, is more closely aligned with the Ninth Circuit – and the plain language of section 1415(l) – than it is with the First Circuit. In M.P. v.

Independent Sch. Dist. No. 721, 439 F.3d 865, 868 (8th Cir. 2006), a case brought by a student with learning disabilities, the court held that, "Our precedent indicates that even when a plaintiff's IDEA claims fails for lack of jurisdiction, a Section 504 claim may still be considered," and reversed and remanded the case to the district court for further proceedings. Id.

In Board of Education v. Ross, 486 F.3d 267, 278 (7th Cir. 2007), the United States Court of Appeals for the Seventh Circuit (the "Seventh Circuit") addressed itself to a district court's entry of summary judgment (not a dismissal) against parents' claims under Section 504 and the ADA on the basis that related IDEA claims had been similarly disposed of. The Seventh Circuit affirmed the summary judgment, but only because the district court had applied the "correct standard" to the section 504 and ADA claims, i.e., the district court had found that "no reasonable trier of fact could find that the [school district] intentionally discriminated against [the student]." Id. at 279. By insisting that the elements of claims under section 504 and the ADA be addressed distinctly from the IDEA, the Seventh Circuit in Ross approached those statutes consistently with the Ninth Circuit's approach and inconsistently with the First Circuit's approach. If the parents in Ross were to bring their claim in the First Circuit today, they would not progress past the school district's motion to dismiss.

The United States Court of Appeals for the Tenth Circuit recently ruled that plaintiffs' claims

for retaliation under Section 504 can be distinct from those under the IDEA and can survive the dismissal of related IDEA claims. Ellenberg v. New Mexico Military Institute, 478 F.3d 1262, 1267 (2007).

C. This Issue Presents an Important Federal Question.

The question presented by this petition has grave implications for the millions of students across the United States who are living with disabilities – and their parents. Over six million (6,000,000) students in the United States participate in IDEA-provided education plans, and this figure represents 9.1 percent of the general population of the United States, ages 6 through 21. Office of Special Education Program, U.S. Department of Education, 27th Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act, Vol. 1, (2005), p. 44. There was an average of more than 90,000 students in each state learning under individual education plans as of the 2004-2005 school year, and approximately twelve percent of school districts had conducted or participated in one or more formal mediations following a due process request. Ellen Schiller, Fran O'Reilly, Tom Fiore, eds., Marking the Progress of IDEA Implementation: The Study of State and Local Implementation and Impact of Individuals with Disabilities Education Act, Report to the Office of Special Education Programs, U.S. Department of Education (April 2006), p. 19-20. Furthermore, four percent of districts participated in some kind of litigation about the IDEA provisions and its rights.

This Court last year held that the rights of parents and children to special education are coextensive. Winkelman v. Parma City Sch. Dist., 550 U.S. __, 127 S.Ct. 1994, 2002 (2007) ("IDEA defines one of its purposes as seeking 'to ensure that the rights of children with disabilities and parents of such children are protected.' §1400(d)(1)(B). The word 'rights' in the quoted language refers to the rights of parents as well as the rights of the child; otherwise the grammatical structure would make no sense."). Accordingly, the question presented by this case affects students and parents alike.

II. THE FIRST CIRCUIT'S DECISION BELOW DIRECTLY CONTRAVERTED BOTH THE PLAIN LANGUAGE OF AND THE CONGRESSIONAL INTENT BEHIND SECTION 1415(l), AND THE COURT SHOULD SETTLE THIS IMPORTANT QUESTION OF FEDERAL LAW

A. Section 1415(l) of the IDEA Unambiguously Preserves Claims Under the ADA and Section 504

There is no ambiguity in Section 1415(l). The provision states, in relevant part:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, Title

> V of the Rehabilitation Act of 1973, or other Federal law protecting the rights of children with disabilities . . . .

(emphasis added). In view of the absence of ambiguity in the provision, it must be applied as written. Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 842-843 (1984) ("First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.")

B. The First Circuit has Nonetheless Failed to Apply the Plain Language of Section 1415(l)

Even though the First Circuit lacks the discretion to impose upon parents of IDEA-disabled children requirements not present in the ADA or Section 504, it has done just this in its recent IDEA decisions. In Diaz-Fonseca, the First Circuit held that "[w]here the essence of the claim is one stated under the IDEA for denial of FAPE, no greater remedies than those authorized under the IDEA are made available by recasting the claim as one brought under . . . Title II of the ADA[] or section 504 of the Rehabilitation Act." 451 F.3d at 19.

Without this Court's redress, IDEA-disabled children and their parents who reside within the boundaries of the First Circuit will be denied rights that Congress long ago took great pains to provide.

C. The Legislative History of Section 1415(l) of the IDEA Reveals that Congress Intended for the Full Panoply of Remedies under Section 504 and the ADA to be Available to Claimants in IDEA-Related Contexts

No further argument is necessary to demonstrate the First Circuit's departure from accepted standards of statutory interpretation than has already been provided. But because the clarity of the congressional record on the passage of section 1415(l) rivals that of the section's language, petitioners include a summary here.

Congress amended the EAHCA to add what eventually became section 1415(l) of the IDEA as a response to this Court's decision in Smith v. Robinson, 468 U.S. 992 (1984). In Smith, the Court denied an award of attorney's fees to plaintiffs, who had prevailed under 20 U.S.C. § 1415 of the EAHCA. The Court's holding restricted the availability of certain remedies under Section 504 in circumstances where such claim related to a claim under the EAHCA. In denying the award of attorney's fees, the Court affirmed a decision of the First Circuit. See Smith v. Cumberland Sch. Comm., 703 F.2d 4 (1st Cir. 1983).

This Court in Smith held that when Congress passed the EAHCA in 1975, it intended for that law to be the only avenue for legal claims involving the provision of FAPE for children with disabilities.

Smith, 468 U.S. at 1009. Under this reading, FAPE-based claims under Section 504 and/or Section 1983 were precluded. To that point, Section 504 and section 1983 had been important, in no small part, because of their explicit provisions for attorney fees and money damages, provisions which the EAHCA lacked. Thus, prior to Smith, when parents prevailed on claims under Section 504 and section 1983, courts would often award attorney fees. See, e.g., Espino v. Besteiro, 708 F.2d 1002 (5th Cir. 1983). This stopped after Smith, which made it less likely that parents with limited means would be able to obtain representation in EAHCA cases. Justice Brennan, dissenting in Smith, noted:

> Congress will now have to take the time to revisit the matter. And until it does, the handicapped children of this country whose difficulties are compounded by discrimination and by other deprivations of constitutional rights will have to pay the costs.

Id. at 1031.

Congress did revisit the matter, and when it did so, it rejected this Court's holding in Smith. This rejection is evidenced, in part, by Section 3 of PL 99-372, which then provided that nothing in it shall be construed to limit "the rights, procedures and remedies available under the constitution or title V of the Rehabilitation Act of 1973 . . ." or other laws.[2]

---

[2] As PL 99-372 was passed in 1986, there is no reference in Section 3 to the Americans with Disabilities Act of 1990. The

Representative Steven Bartlett stated:

> Those of us in Congress familiar with Public Law 94-142, our special education law, considered the Smith v. Robinson decision to be an erroneous interpretation of congressional intent: It wrongly cut off access to our judicial system by parents seeking to enforce their handicapped child's rights. We have, with this conference agreement, properly restored access to our judicial system, but, we have gone well beyond that.

132 Cong. Rec. H4842-43 (daily ed. July 24, 1986) (statement of Rep. Bartlett). These sentiments were also expressed by Senator Lowell Weicker, one of the prime sponsors of the legislation:

> The purpose of S. 415 is simple--to overturn the Smith v. Robinson decision and thereby to clarify congressional intent regarding these matters. The fact that Congress did not intend to leave unprotected the rights of handicapped children and their parents to secure the free appropriate public education promised to them by EHA was made clear in the 1978 passage of section 505(b) of the Rehabilitation Act which

---

reference to the ADA was subsequently added to Section 1415(l) of the IDEA. As noted further below, the ADA's passage after the IDEA renders completely untenable the First Circuit's implied holding that Congress impliedly repealed the ADA in IDEA-related contexts.

> made attorney's fees available under section 504. Section 505(b) clearly does not make an exception for handicapped children seeking an appropriate education. Indeed, the 1978 Senate and House reports accompanying section 505(b) explain that disabled individuals were one of the very few minority groups in this country who had not been specifically authorized by Congress to seek attorney's fees. The purpose of section 505(b) was "to correct the omission [sic] and thereby assist handicapped individuals in securing the legal protection guaranteed them."
>
> Unfortunately, because the court in Smith v. Robinson misinterpreted Congress' intent, handicapped children are now provided substantially less protection against discrimation [sic] than other vulnerable groups of people. S. 415 would remove these inequities by restoring equivalent protection to handicapped children, a group undeniably deserving congressional protection.

131 Cong. Rec. S10397-10398 (daily ed. July 30, 1985) (statement of Sen. Weicker).

Since 1986, the federal special education law has been amended three times: in 1991, and again, more generally, in 1997 and 2004, as the result of reauthorizations. Despite these general revisions to the federal special education law, the provision that was Section 3 of the Handicapped Children's Protection Act has remained essentially unchanged,

clear and manifest." Id. Absent such clarity, "the later act is to be construed as a continuation of, and not a substitute for, the first act." Id.

As a threshold matter, because Congress passed the ADA in 1990, i.e., after the passage of the IDEA, there is simply no basis to conclude that Congress intended the IDEA to supply the exclusive remedy for harm redressable by both the IDEA and the ADA. Implied repeal operates where a later act covers a "whole subject."

Furthermore, because Section 504 supplies rights, it is not a candidate for implied repeal in the way that section 1983 is. In Rancho Palos Verdes, the Court addressed whether money damages and attorney's fees under section 1983 were available for a violation of the Telecommunications Act of 1996 ("TCA") (47 U.S.C. § 332(c)(7)). 544 U.S. at 119. In concluding that recovery under section 1983 was incompatible with the comprehensive enforcement scheme established by the TCA, the Court reasoned, that "[t]he provision of an express, private means of redress in the statute itself is ordinarily an indication that Congress did not intend to leave open a more expansive remedy under section 1983." Id. at 121 (emphasis added). The canon against implied repeal did not operate to preserve remedies under section 1983 because that statute does not create rights "but merely provides a civil cause of action to remedy 'some otherwise defined federal right.'" Id. at 120, n. 2, quoting Great Am Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 376 (1979).

The inverse of the Court's conclusion in Rancho Palos Verdes is that where, as in the cases of the ADA and Section 504, a later statute that "creates rights" overlaps with a former statute that supplies its own "private means of redress," implied repeal is untenable. This is doubly so in the context of section 1415(l) because not only was the "intention of the legislature to repeal" not "clear and manifest," the reverse was true. Congress could not have been clearer in its language that it intended to avoid implied repeal. And, as demonstrated above, the legislative history of section 1415(l) buttresses this reading of the section, which reading is, in any event, dictated by the clarity of the language.

Finally, to look for a moment at the two "well-settled" categories of repeal by implication, neither "irreconcilable conflict" nor legislation of a "whole subject" is present here. Section 1415(l)'s savings clause eliminates any notion of irreconcilable conflict. Congress made it eminently clear that both FAPE-based remedies and compensatory damages should be available to claimants under Section 504 and the ADA. Furthermore, as the Ninth Circuit has correctly noted, there are elements of proof required of claims under Section 504 that are not required of claims under the IDEA.

The notion that Congress impliedly repealed section 504 and the ADA when it passed the IDEA is strained well past the point of breaking by the language and legislative history of the IDEA's savings clause, section 1415(l). Petitioners respectfully urge this Court to supply an avenue

whereby they could redress the First Circuit's nullification of such rights, which abdication conflicts not only with section 1415(l)'s plain language and legislative history but also with important decisions of this Court.

IV. THE FIRST CIRCUIT'S DECISIONS SO FAR DEVIATE FROM THE USUAL AND ACCEPTED PRACTICE AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWERS

The First Circuit's affirmance of the District Court's dismissal of the Parent's complaint on the basis of the former's decision in Diaz-Fonseca constitutes a dramatic departure from the manner in which other federal courts of appeals approach the overlapping statutes at issue in this case. This case involves the alleged actions of a school district to thwart parental advocacy on behalf of children identified as disabled under the IDEA. Section 1415(l) clearly maintains that children so identified and their parents retain the protections granted by Section 504 and the ADA. Among these protections is the entitlement to compensatory damages, provided that the elements of the provisions are satisfied.

The First Circuit has gone well beyond the proper scope of barring damages claims for denial of FAPE under the IDEA and extended its reach effectively to bar any claim under Section 504 or the ADA brought by a child or parent of a child identified under the IDEA. Indeed, in the face of statutory

language as clear as 1415(l) is – and, although it is unnecessary to resort to such history, legislative history that, too, possesses crystalline clarity – petitioners respectfully submit that if this Court's supervisory powers are ever properly invoked, this must be such context where they ought to be.

CONCLUSION

Petitioners respectfully request that this Court grant this petition for certiorari to review the questions that would be presented on this appeal.

Dated: March 12, 2008

Respectfully submitted,

NIXON PEABODY LLP

Dennis M. Duggan, Jr., Esq.
Counsel of Record
Jamie N. Hage, Esq.
On the Petition
100 Summer Street
Boston, Massachusetts 02110
(617) 345-1000
Attorneys for Petitioners

APPENDICES

A. Judgment of the United States Court of Appeals for the First Circuit affirming the District Court (December 13, 2007) A-1

B. Order of the United States District Court for the New Hampshire, denying motion for reconsideration (March 15, 2007) A-2

C. Order of the United States District Court for the District of New Hampshire, dismissing plaintiff's claims dated (January 29, 2007) .. A-5

D. Statutes and Regulations Involved in the Case A-17

1. Individuals with Disabilities Education Act, 20 U.S.C. § 1415(l) A-17

2. Rehabilitation Act of 1973, 29 U.S.C. § 794..... ..... A-18

3. 42 U.S.C. § 1983..... A-21

4. Americans with Disabilities Act, 42 U.S.C. § 12132..... A-22

5. Americans with Disabilities Act, 42 U.S.C. § 12203..... A-23

United States Court of Appeals
For the First Circuit

No. 07-1645

CATHERINE BURKE and MIKAEL ROLFHAMRE,
Plaintiffs, Appellants,
v.
THE BROOKLINE SCHOOL DISTRICT,
Defendant, Appellee.

JUDGMENT

Entered: December 13, 2007

This cause came on to be submitted on the briefs and original record on appeal from the United States District Court for the District of New Hampshire.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows:
The judgment of the district court is affirmed.

By the Court
[Stamped] [Signed]
Richard Cushing Donovan, Clerk

[cc: Mr. Hage, Mr. Childs, Mr. Eggert, Ms. Bethel, & Mr. Lospennato.]

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Catherine Burke and

Mikael Rolfhamre

v. Civil No. 06-cv-317-JD

Brookline School District

ORDER

After the court granted Brookline School District's motion to dismiss the complaint, Catherine Burke and Mikael Rolfhamre, who are proceeding pro se, moved for reconsideration. Their motion is supported by a memorandum of law filed by the Disabilities Rights Center, Inc., as amicus curiae. The District opposes reconsideration.

In the order dismissing the complaint, the court found that the plaintiffs had limited their claims to retaliation under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12203, and violation of the procedural requirements of Section 504 of the Rehabilitation Act. The plaintiffs did not pursue claims under the Family Educational Rights and Privacy Act ("FERPA"), the Individuals with Disabilities in Education Act ("IDEA"),[1] and 42

[1] The District repeatedly refers to the "IDIEA." The court assumes that the District intended the Individuals with Disabilities in Education Act or IDEA as it is commonly abbreviated.

U.S.C. § 1983, and those claims were dismissed. The court held that the plaintiffs' ADA and Section 504 claims were barred by the holding in Diaz-Fonseca v. Puerto Rico, 451 F.3d 13, 29 (1st Cir. 2006), that "where the underlying claim is one of violation of the IDEA, plaintiffs may not use § 1983—or any other federal statute for that matter—in an attempt to evade the limited remedial structure of the IDEA."

The plaintiffs argue, with the assistance of amicus curiae, that their claims are independent retaliation claims under the ADA and Section 504 which are not restricted by the holding in Diaz-Fonseca.[2] The First Circuit stated in Diaz-Fonseca that "the IDEA does not restrict rights and remedies that were already independently available through other sources of law." Id. The plaintiffs contend that because the ADA and Section 504 also provide remedies for retaliation, their claims are independent of the IDEA.

As the court noted in the previous order, however, the plaintiffs' claims are premised on violations of the IDEA and the District's response to the plaintiffs' efforts to obtain IDEA benefits for their children. Because of similar provisions in the ADA, Section 504, and the IDEA, claims arguably might arise under all three statutes. The plaintiffs assert in the memorandum submitted on their

[2] They acknowledge that their complaint was "not artfully drafted." Mem. at 9.

behalf by amicus curiae that "the gravamen of their claims are that Defendant 'engaged in retaliation, coercion, intimidation and interference' as a result of their advocacy for children under the Individuals with Disabilities Education Act . . . ." Mem. at 1. The IDEA provides for retaliation claims that are related to rights protected under the IDEA. See Weber v. Cranston Sch. Comm., 212 F.3d 41, 51-52 (1st Cir. 2000). Only claims for violations of rights independently provided under the other statutes are actionable outside of the restricted remedies allowed under the IDEA. Diaz-Fonseca, 451 F.3d at 29. The plaintiffs have not convinced the court that their claims are based on rights and remedies that are independent of the IDEA

Conclusion

For the foregoing reasons, the plaintiffs' motion for reconsideration (document no. 15) is denied.

SO ORDERED.

[Signed]
Joseph A. DiClerico, Jr.
United States District Judge

March 15, 2007

cc: Catherine E. Burke, pro se
Dean B. Eggert, Esquire
Ronald K. Lospennato, Esquire
Mikael Rolfhamre, pro se

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Catherine Burke and

Mikael Rolfhamre

v. Civil No. 06-cv-317-JD
Opinion No. 2007 NDH 012

Brookline School District

ORDER

Catherine Burke and Mikael Rolfhamre, who are proceeding pro se, bring suit against the Brookline School District, alleging violations of the Americans with Disabilities Act ("ADA"), Section 504 of the Rehabilitation Act, the Individuals with Disabilities in Education Act ("IDEA"), and the Family Educational Rights and Privacy Act ("FERPA"), and alleging a claim under 42 U.S.C. § 1983. The plaintiffs seek $250,000 in damages.[1] The Brookline School District moves to dismiss the plaintiffs' claims.

Standard of Review

In considering a motion to dismiss, the court "take[s] as true all well—pleaded allegations and draw[s] all reasonable inferences in the plaintiff's favor." Ezra Charitable Trust v. Tyco Int'l, Ltd., 466

[1] Their claim for attorneys' fees was previously stricken.

F.3d 1, 5-6 (1st Cir. 2006). "The court need not accept a plaintiff's assertion that a factual allegation satisfies an element of a claim, however, nor must a court infer from the assertion of a legal conclusion that factual allegations could be made that would justify drawing such a conclusion." Cordero-Hernandez v. Hernandez-Ballesteros, 449 F.3d 240, 244 n.3 (1st Cir. 2006). In addition, the court will "disregard bald assertions, unsupportable conclusions, and opprobrious epithets." Ezra Charitable Trust, 466 F.3d at 6. "'A complaint should not be dismissed unless it is apparent beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.'" Stanton v. Metro Corp., 438 F.3d 119, 123-24 (1st Cir. 2006) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)) (other quotation marks omitted).

Background

Catherine Burke and Mikael Rolfhamre lived within the Brookline School District from 1998 until August of 2005. They adopted three sisters, Kasey, Sasha, and Ilona, from a Russian orphanage in 1998. The plaintiffs allege that the girls were identified as students in need of special education under the IDEA, as individuals with disabilities under the ADA, and as handicapped persons under Section 504 of the Rehabilitation Act.

The plaintiffs' pro se complaint does not provide a clear chronological description of the

events that led to their claims. It appears that the plaintiffs' problems with the special education program in the Brookline School District began in 2003. The plaintiffs state that they met with members of the Brookline school board, starting in 2003, to report the problems they were experiencing with the special education program. They contend that school board members acknowledged problems but failed to take any action.

The plaintiffs allege that Kasey and Sasha attended Mont Blanc Academy for the 2003-2004 school year. The Academy is a small private school located in Hooksett, New Hampshire. It is not approved for special education by the New Hampshire Department of Education. They also allege that they sought an evaluation of Kasey in 2003 and then were embroiled in a disagreement with the District about who would serve as the evaluator and how the evaluation would be conducted.

They state that they filed a Section 504 grievance on September 15, 2003, and requested a due process hearing in October of 2003. They contend that the hearing was not provided until September of 2004, after the "Office for Civil Rights" intervened in the matter. The plaintiffs assert that the hearing officer was not impartial and that the District interfered with the investigation of their complaint by failing to make complete records available and by providing incorrect and misleading information to the investigator. The plaintiffs do not

state what decision was reached by the hearing officer.[2]

They allege that the District did not obtain their consent to continue Sasha's placement at Mont Blanc Academy for the 2003-2004 year. They also allege that the District did not obtain their consent to provide special education services to Sasha and Kasey and did not include the plaintiffs in developing an Individual Education Plan ("IEP") for Sasha and Kasey. They criticize the qualifications of the person the District hired to provide services to their daughters for the 2004-2005 school year. They also criticize the District's handling of their daughters' school records and contend that the District failed to make the records available to them.

The plaintiffs state that the District requested a hearing in June of 2004 to approve Kasey's placement at "CSDA," which is the District's "upper elementary school." Compl. at 18. They allege that the hearing officer issued a decision in August of 2004 which ordered that Kasey be home schooled. The plaintiffs state that the hearing officer's decision was not appealed. They allege that the District failed to provide for Kasey's education and intimidated them by telling them that keeping Kasey at home violated New Hampshire's compulsory education laws. As a result, the

[2] It is not clear whether the hearing in the fall of 2004 was resolved by the November 2004 settlement agreement.

plaintiffs enrolled Kasey at CSDA in September of 2004 to avoid truancy charges.

The plaintiffs sought an independent evaluation of Kasey in the fall of 2004. They allege that the District did not approve the independent evaluator the parents had chosen. They signed a settlement agreement on the evaluation issue on November 5, 2004, which they allege approved their independent evaluator but imposed conditions on them. They claim that they were coerced into signing the settlement agreement because they believed the District had passed a new policy that would have allowed the District to exclude the plaintiffs' evaluator absent the agreement. They contend that they learned after signing the agreement that the District's policy was different than they had understood it to be, and they contend that the District deliberately misled them.

The plaintiffs refer to a New Hampshire Department of Education hearing in May of 2005 as a placement hearing for Kasey. They state that they were seeking reimbursement for placing Kasey at a private school when the District failed to provide her with a free and appropriate public education as required by the IDEA. They contend that the District interfered with the hearing by misrepresenting the record, providing false testimony, and giving incorrect information about the programming that had been provided to Kasey. The plaintiffs also contend that the District attempted to show that they were uncooperative by falsely claiming that the plaintiffs were seeking a

residential placement for Kasey and by falsely stating that the plaintiffs had not objected to the District's evaluation until the hearing. The complaint does not indicate what result was achieved through the hearing.

The plaintiffs allege that they were regarded as troublemakers after they filed complaints. As a result, they assert, special education department staff members "spread false and damaging rumors about [the plaintiffs] to staff at [Mont Blanc Academy] during the 2003-2004 school year and fueled negative attitudes toward [the plaintiffs]." Compl. at 29. They also allege that the District sought medical and mental health records to use against the plaintiffs in litigation, enacted an evaluation policy to disqualify the plaintiffs' chosen independent evaluator, conditioned Kasey's IEP in February of 2005 on her mother agreeing to a psychiatric evaluation, and provided their children with inferior treatment that was not in compliance with state standards.

Discussion

The plaintiffs do not state separate claims in their complaint. Instead, they cite Section 504 of the Rehabilitation Act, the ADA, the IDEA, the FERPA, and § 1983 as the law that is applicable to their claims. In a section titled "Factual Allegations," the plaintiffs allege that the District disregarded Section 504, ADA, and IDEA regulations; violated the plaintiffs' asserted rights under the IDEA and Section 504; and retaliated against the plaintiffs for filing grievances and complaints. The District

interprets the plaintiffs' complaint as alleging violations of the ADA, Section 504, FERPA, and § 1983 that are all based on the IDEA and moves to dismiss. The plaintiffs object to the motion to dismiss.

A. IDEA and FERPA

Money damages are not available in a suit brought under the IDEA. Dias-Fonseca v. Puerto Rico, 451 F.3d 13, 28 (1st Cir. 2006). In addition, the FERPA does not provide either a private cause of action or rights that are actionable under § 1983. Gonzaga Univ. v. Doe, 536 U.S. 273, 276, 280 (2002). Therefore, to the extent the plaintiffs alleged claims under the IDEA or the FERPA, those claims are dismissed.

In their objection, the plaintiffs do not address the FERPA and contend that they are not alleging a claim under IDEA. Instead, they assert, their claims are "that because of their advocacy on behalf of their children, the District engaged in retaliation, coercion, intimidation and interference; activities which are prohibited by the ADA (42 U.S.C. § 12203)" and "that the District as a matter of policy and practice failed to carry out the requirements of Section 504 that pertain to parents' rights." Obj. Mem. at 3. Based on their statements in their objection, the plaintiffs claim retaliation in violation of the ADA, 42 U.S.C. § 12203, and

violation of the procedural requirements of Section 504 of the Rehabilitation Act.

B. ADA Claim

The ADA provides: "No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under this chapter." 42 U.S.C. § 12203(a). The ADA also prohibits coercion, intimidation, threatening, and interference of any individual "on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter." § 12203(b). The IDEA affords an opportunity to parents to file complaints for retaliation or coercion that are related to "the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to such child." Weber v. Cranston Sch. Comm., 212 F.3d 41, 51 (1st Cir. 2000).

General compensatory damages are not available in an IDEA-based suit. Dias-Fonseca, 451 F.3d at 28-31. "[W]here the underlying claim is one of violation of the IDEA, plaintiffs may not use § 1983—or any other federal statute for that matter—in an attempt to evade the limited remedial structure of the IDEA." Id. at 29. Claims are based

on the IDEA when they depend "on the rights created by statute in the IDEA" and are not independent claims under a different federal statute. Id.

In this case, the plaintiffs allege that they were coerced into signing a settlement agreement to resolve their dispute with the District about an independent evaluation of their daughter, Kasey. They allege that the District interfered with their access to grievance procedures to address their dispute with the District about Kasey's evaluation. The plaintiffs' retaliation claim alleges that District personnel retaliated against them because of the plaintiffs' complaints and disputes about the educational services provided to their children. The plaintiffs contend that District staff members fueled negative attitudes toward them among the staff at Mont Blanc Academy, demanded access to medical and mental health records to be used in litigation of the parents' complaints, changed the evaluation policy to exclude the plaintiffs' chosen independent evaluator, conditioned Kasey's IEP on her mother's consent to a psychiatric evaluation, and provided inferior services and treatment that did not comply with the IDEA.

The plaintiffs' claims alleged under § 12203 are closely related to the identification, evaluation, and educational placement of their children for purposes of achieving a free and appropriate public education. See Weber, 212 F.3d at 51. In fact, the plaintiffs state in their objection that the IDEA violations they allege are "examples of specific instances of how the District carried the retaliation,

coercion, intimidation, interference and deprivation of rights which are the basis of [their] claim." Obj. Mem. at 3. As such, they do not allege an independent claim under the ADA but instead allege an IDEA-based claim in the guise of the ADA. Therefore, the ADA claim seeking general compensatory damages must be dismissed.[3] See Diaz-Fonseca, 451 F.3d at 29.

C. Section 504 of the Rehabilitation Act Claim

Both Section 504 of the Rehabilitation Act and the IDEA require states to provide disabled students with a free and appropriate public education. See Mo. Dep't of Elementary & Secondary Educ. v. Springfield R-12, 358 F.3d 992, 998-99 (8th Cir. 2004). The regulations promulgated under Section 504, cited by the plaintiffs, 34 C.F.R. §§ 104.32, 104.25, and 104.36, require school districts to locate qualified handicapped persons and notify their parents of the district's obligation to provide a free and appropriate public education, to conduct evaluations and make placement decisions in accord with certain procedures, and to implement procedural safeguards that can be satisfied by compliance with IDEA requirements. "The IDEA establishes an elaborate scheme of identifying

[3] In addition, an ADA claim is subject to administrative exhaustion, which does not appear to have occurred in this case. See Hess v. Rochester Sch. Dist., 396 F. Supp. 2d 65, 72 (D.N.H. 2005).

individuals with disabilities and ensuring that the responsible school authorities develop, in consultation with parents and students, an educational program for the student that accounts for and addresses that student's needs." Weber v. Cranston Pub. Sch. Comm., 245 F. Supp. 2d 401, 405 (D.R.I. 2003).

The Section 504 regulations the plaintiffs cite in support of their claim provide the same requirements and procedures for ensuring a free and appropriate public education that are required under the IDEA. Therefore, the Rehabilitation Act does not provide a separate and independent cause of action for the plaintiffs' claim based upon the cited regulations. See Diaz-Fonseca, 451 F.3d at 29. The plaintiffs' Rehabilitation Act claim is dismissed.

D. § 1983 Claim

42 U.S.C. § 1983 provides a cause of action to persons who are deprived of "any rights, privileges, or immunities secured by the Constitution and laws" by a person acting under color of state law. The plaintiffs cite § 1983 but do not provide any further explanation of that claim in their complaint, and they ignore § 1983 in their objection to the motion to dismiss. As is stated above, plaintiffs may not invoke § 1983 to bring claims for compensatory damages that are in essence IDEA claims. Diaz-Fonseca, 451 F.3d at 28-31. In addition, no claim may be brought under § 1983 based on an alleged violation of the FERPA. Gonzaga, 536 U.S. at 280.

Therefore, to the extent the plaintiffs intended to bring a claim under § 1983 based on alleged violations of the ADA, the IDEA, Section 504 of the Rehabilitation Act, or FERPA, as alleged in this case, that claim is dismissed.

Conclusion

For the foregoing reasons, the defendant's motion to dismiss (document no. 8) is granted. All of the plaintiffs' claims are dismissed for failure to state a claim upon which relief may be granted. The clerk of court shall enter judgment accordingly and close the case.

SO ORDERED.

[Signed]
Joseph A. DiClerico, Jr.
United States District Judge

January 29, 2007

cc: Catherine E. Burke, pro se
Dean B. Eggert, Esquire
Mikael Rolfhamre, pro se

TITLE 20. EDUCATION

CHAPTER 33. EDUCATION OF INDIVIDUALS WITH DISABILITIES

ASSISTANCE FOR EDUCATION OF ALL CHILDREN WITH DISABILITIES

20 USCS § 1415

§ 1415. Procedural safeguards

[...]

(l) Rule of construction. Nothing in this title shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this part, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this part.

[...]

TITLE 29. LABOR

CHAPTER 16. VOCATIONAL REHABILITATION AND OTHER REHABILITATION SERVICES RIGHTS AND ADVOCACY

29 USCS § 794

§ 794. Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations. No otherwise qualified individual with a disability in the United States, as defined in section 7(20), shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) "Program or activity" defined. For the purposes

of this section, the term "program or activity" means all of the operations of--

(1) (A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2) (A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 9101 of the Elementary and Secondary Education Act of 1965), system of vocational education, or other school system;

(3) (A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship--

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2),

or (3); any part of which is extended Federal financial assistance.

(c) Significant structural alterations by small providers. Small providers are not required by subsection (a) to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on the date of the enactment of this subsection.

(d) Standards used in determining violation of section. The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

TITLE 42. THE PUBLIC HEALTH AND WELFARE

CHAPTER 21. CIVIL RIGHTS GENERALLY

42 USCS § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

TITLE 42. THE PUBLIC HEALTH AND WELFARE

CHAPTER 126. EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES

PUBLIC SERVICES

PROHIBITION AGAINST DISCRIMINATION AND OTHER GENERALLY APPLICABLE PROVISIONS

42 USCS § 12132

§ 12132. Discrimination

Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

TITLE 42. THE PUBLIC HEALTH AND WELFARE

CHAPTER 126. EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES

MISCELLANEOUS PROVISIONS

42 USCS § 12203

§ 12203. Prohibition against retaliation and coercion

(a) Retaliation. No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this Act or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act.

(b) Interference, coercion, or intimidation. It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this Act.

(c) Remedies and procedures. The remedies and procedures available under sections 107, 203, and 308 of this Act shall be available to aggrieved

persons for violations of subsections (a) and (b), with respect to title I, title II and title III, respectively.

OPPOSITION BRIEF

93

(2)

No. 07-1175

FILED
MAY 15 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

CATHERINE BURKE and MIKAEL ROLFHAMRE,
Petitioners,

v.

THE BROOKLINE SCHOOL DISTRICT,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

BRIEF IN OPPOSITION

DEAN B. EGGERT, ESQ.
Counsel of Record
Alison M. Minutelli, Esq.
Wadleigh, Starr & Peters, P.L.L.C.
95 MARKET STREET
MANCHESTER, NH 03101
(603) 669-4140

Attorneys for Respondent

May 15, 2008

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

RESTATED QUESTION PRESENTED

Whether parents of children with educational disabilities who have failed to prevail in any administrative proceedings brought pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et. seq.* ("IDEA"), can recover monetary damages by recasting their IDEA claims as complaints for damages under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504") and the Americans with Disabilities Act, 42 U.SC. § 12132 *et seq.* ("ADA").

CORPORATE DISCLOSURE STATEMENT

The Respondent, Brookline School District, is a governmental corporate party to this appeal. No corporate disclosure statement is required by Supreme Court Rule 29.6 (2007).

TABLE OF CONTENTS

RESTATED QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

STATEMENT OF JURISDICTION 1

COUNTERSTATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 5

REASONS FOR DENYING THE PETITION 6

I. Petitioners' Question Presented is Not the Issue Presented by the Facts of this Case. . 6

II. The First Circuit's Decision is Correct and is Consistent with the Decisions of Other Circuits. 8

III. The First Circuit's Decision Conforms to the Accepted and Usual Course of Judicial Proceedings. 10

IV. This Court Need Not Reach the Question Presented Because the Petitioners' Failure to Exhaust Their Administrative Remedies and Failure to Prevail at any Administrative Proceeding Provide Independent Bases for Dismissal. 15

A. Petitioners Have Failed to Exhaust Their Administrative Remedies. . . . 15

B. Petitioners are not a Prevailing Party in Any Administrative Proceeding. . 17

CONCLUSION 20

APPENDIX

Appendix A: Excerpts from Plaintiff's Motion For Leave to Amend Complaint and Amended Complaint, *R. v. Brookline School District*, No. 05cv292-SM (D.N.H. filed May 3, 2006) 1b

Appendix B: Order of the United States District Court for the District of New Hampshire, granting in part and denying in part the Motion for Leave to File Amended Complaint, *R. v. Brookline School District*, No. 05cv292-SM (D.N.H. May 15, 2006) 7b

Appendix C: Order of the United States District Court for the District of New Hampshire, *R. v. Brookline School District*, No. 05cv292-SM (D.N.H. Aug. 22, 2007) 9b

TABLE OF AUTHORITIES

CASES

Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley,
458 U.S. 176 (1982) 12

Bell Atl. Corp. v. Twombly,
127 S.Ct. 1955 (U.S. 2007) 7, 14

Blanchard v. Morton Sch. Dist.,
509 F.3d 934 (9th Cir. 2007), *cert. denied*,
128 S. Ct. 1447 (U.S. 2008) 14

Burke v. Brookline Sch. Dist., No. 06cv215-SM,
2007 WL 2669717 (D.N.H. Sept. 6, 2007) 2

Cave v. E. Meadow Union Free Sch. Dist.,
514 F.3d 240 (2d Cir. 2008) 16

Charlie F. v. Bd. of Educ. of Skokie Sch. Dist. 68,
98 F.3d 989 (7th Cir. 1996) 16

Diaz-Fonseca v. Puerto Rico,
451 F.3d 13 (1st Cir. 2006) 4, 5, 8-10, 13

Ellenberg v. New Mexico Military Institute,
478 F.3d 1262 (10th Cir. 2007) 9

Frazier v. Fairhaven Sch. Comm.,
276 F.3d 52 (1st Cir. 2002) 11, 16

Indep. Sch. Dist. No. 283 v. S.D.,
88 F.3d 556 (8th Cir. 1996) 19

J.L. v. Ambridge Area School District, No. 06-1652,
2008 WL 509230 (W.D. Pa. Feb. 22, 2008) . . . 12

J.P. v. Cherokee County Bd. of Educ.,
218 Fed. App'x 911 (11th Cir. 2007) 16

Jeremy H. v. Mount Lebanon Sch. Dist.,
95 F.3d 272 (3d Cir. 1996) 17

Kathleen H. v. Mass. Dep't of Educ.,
154 F.3d 8 (1st Cir. 1998) 17

Lauren W. v. Deflaminis,
480 F.3d 259 (3d Cir. 2007) 18

Lessard v. Wilton Lyndeborough Coop. Sch. Dist.,
518 F.3d 18 (1st Cir. 2008) 11

M.P. v. Independent School District No 721,
439 F.3d 865 (8th Cir. 2006) 9

M.T.V. v. DeKalb County Sch. Dist.,
446 F.3d 1153 (11th Cir. 2006) 16

Marc V. v. N.E. Indep. Sch. Dist.,
455 F. Supp. 2d 577 (W.D. Tex. 2006), *aff'd*,
242 Fed. App'x 271 (5th Cir. 2007). 19

Mark H. v. Lemahieu,
513 F.3d 922 (9th Cir. 2008) 9, 12

Monrosa v. Carbon Black Exp. Inc.,
359 U.S. 180 (1959) 15

Moubry v. Indep. Sch. Dist. 696,
9 F. Supp. 2d 1086 (D. Minn. 1998) 13, 18

Pace v. Bogalusa City Sch. Bd.,
403 F.3d 272 (5th Cir. 2005) 18

Sch. Dist. of Wis. Dells v. Z.S.,
184 F. Supp. 2d 860 (W.D. Wis. 2001), *aff'd*,
295 F.3d 671 (7th Cir. 2002) 12, 18

Smith v. Fitchburg Pub. Schs.,
401 F.3d 16 (1st Cir. 2005) 17

Stanton v. Metro Corp.,
438 F.3d 119 (1st Cir. 2006) 7

STATUTES AND CODES

20 U.S.C. § 1400, *et. seq.* i

20 U.S.C. § 1415(*l*) 4, 10, 12, 14, 16

20 U.S.C. §§ 1415(i)(2), (*l*) 1, 11

20 U.S.C. § 1415(i)(3)(B)(i)(II) 17

28 U.S.C. § 1254(1) 1

29 U.S.C. § 794 i

42 U.S.C. § 1983 5

42 U.SC. § 12132, *et seq.* i

N.H. CODE ADMIN. R. ED 1125.05(c) (West 2001) .. 2

RULES

Sup. Ct. R. 10(a) 10

Sup. Ct. R. 29.6 (2007) ii

REGULATIONS

34 C.F.R. § 104.33(b)(2) 12, 19

34 C.F.R. § 104.36 ..... 12, 19

STATEMENT OF JURISDICTION

Petitioners seek review of an order of the United States Court of Appeals for the First Circuit, which summarily affirmed the dismissal of their case by the United States District Court for the District of New Hampshire on December 13, 2007. Petitioners did not request rehearing.

Respondent, the Brookline School District ("School District"), maintains that the United States District Court for the District of New Hampshire ("District Court") lacks subject matter jurisdiction because the Petitioners, Catherine Burke and Mikael Rolfhamre, ("Petitioners," "Ms. Burke and Mr. Rolfhamre" or "the Parents"), failed to adequately exhaust their administrative remedies as required by the IDEA, 20 U.S.C. §§ 1415(i)(2),(*l*).

Except as indicated above, the statutory provision that confers jurisdiction on the Supreme Court is 28 U.S.C. § 1254(1).

COUNTERSTATEMENT OF THE CASE

The Brookline School District serves approximately 630 students in the rural Town of Brookline, New Hampshire. During the period of 1998 through August 2005, Ms. Burke and Mr. Rolfhamre resided in Brookline, New Hampshire. They are the parents of three children who have been identified as eligible for, and have received, special education and related services under the IDEA.

This Petition arises from the Parents' disagreement with the December 13, 2007 decision of the First Circuit Court of Appeals, which summarily affirmed the District Court's order granting the School District's motion to dismiss for failure to state a claim upon which relief may be granted.

From April 2004 through October 2005, the Parents and the District were involved in ten IDEA administrative proceedings.[1] Two of these proceedings are currently on appeal with the United States District Court for the District of New Hampshire. *Burke v. Brookline Sch. Dist.*, No. 06cv215-JL (D.N.H. filed June 8, 2006);[2] *R. v. Brookline Sch. Dist.*, No. 05cv292-JL (D.N.H. filed Aug. 23, 2005).[3] At no time has any administrative hearing officer either ruled in favor of the Parents, or in any way determined that they were a prevailing party.

---

[1] Eight of these proceedings were initiated by the Parents. Two were initiated by the School District in accord with N.H. CODE ADMIN. R. ED 1125.05(c) (West 2001), and arose from the Parents' disagreement with the School District's educational proposals. The Parents also filed complaints with the federal Office for Civil Rights and with the State of New Hampshire Department of Education.

[2] On September 6, 2007, the District Court issued an order substituting Ms. Burke and Mr. Rolfhamre as named parties in 06cv215. *Burke v. Brookline Sch. Dist.*, No. 06cv215-SM, 2007 WL 2669717 (D.N.H. Sept. 6, 2007). On January 17, 2008, this case was reassigned and given the designation 06cv215-JL.

[3] On January 17, 2008, this case was reassigned and given the designation 05cv292-JL.

In *R. v. Brookline School District*, counsel for the Petitioners moved to amend, seeking, in part, to add a claim for Section 504/ADA damages to their IDEA administrative appeal. Appendix A to Brief in Opposition ("Appendix") at 1b-6b (Excerpts from Motion for Leave to File Amended Complaint and Amended Complaint, 05cv292-JL (D.N.H. May 3, 2006)). The District Court denied the motion as to "other new issues not raised at either [administrative] hearing." Appendix B at 7b-8b (Order Granting in Part and Denying in Part the Motion for Leave to File Amended Complaint, 05cv292-JL (D.N.H. May 15, 2006)). Thereafter, counsel for the Petitioners filed two amended complaints, neither of which included claims for Section 504 or ADA damages. Motion to Amend, *R.*, 05cv292-JL (D.N.H. May 25, 2006); Amended Complaint, *R.*, 05cv292-JL (D.N.H. Nov. 28, 2006). Ultimately, Petitioners' amended complaint was stricken in its entirety. Appendix C at 9b-11b (Order of the United States District Court for the District of New Hampshire, *R.*, 05cv292-JL (D.N.H. Aug. 22, 2007)).

In August 2006, the Parents brought this suit against the Brookline School District, seeking $250,000.00 in damages. *Burke v. Brookline Sch. Dist.*, No. 06cv317-JD (D.N.H. filed Aug. 25, 2006). Petitioners' *pro se* Complaint alleged three categories of IDEA-based facts: (1) allegations that occurred outside of the statute of limitations; (2) allegations that occurred after the most recent administrative proceedings, and for which there had been no exhaustion; and (3) allegations that had been the subject of prior administrative hearings, in which there were findings in favor of the School District.

In lieu of answering, the School District moved to dismiss for failure to state a claim on which relief may be granted. The School District argued that as a matter of law Petitioners could not recover monetary damages for their claims, all of which were premised on rights created by the IDEA. *See Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 19 (1st Cir. 2006). The School District also sought dismissal based on the Petitioners' failure to exhaust their administrative remedies. *See* 20 U.S.C. § 1415(*l*).

The District Court granted the School District's Motion to Dismiss, holding that the Parents had not "allege[d] an independent claim under the ADA but instead allege[d] an IDEA-based claim in the guise of the ADA," and that they had not alleged "a separate and independent cause of action" under Section 504 of the Rehabilitation Act. Appendix to Petition for Writ of Certiorari ("Petitioners' Appendix") at 14-15 (District Court Order of January 29, 2007). The District Court also noted that it did not appear that the Parents had exhausted their administrative remedies. *Id.* at 14, n. 3.

Petitioners moved for reconsideration of the denial of their Section 504 and ADA claims. The Motion for Reconsideration was denied by the District Court on March 15, 2007. Petitioners' Appendix at 4 (District Court Order of March 15, 2007 ("Only claims for violations of rights independently provided under the other statutes are actionable outside of the restricted remedies allowed under the IDEA")). The Parents then filed an appeal with the United States Court of Appeals for the First Circuit.

On appeal, the School District argued that the District Court's decision should be affirmed based on the Petitioners' failure to exhaust their administrative remedies, or, alternatively, in accord with the First Circuit's decision in *Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13 (1st Cir. 2006). On December 13, 2007, the First Circuit summarily affirmed the District Court's decision "in accord with *Diaz-Fonseca*."

SUMMARY OF THE ARGUMENT

The Petition should be denied because this case seeks to circumvent the established legal principle that money damages are unavailable under the IDEA.

Petitioners, knowing full well that monetary damages are not available under the IDEA, and that 42 U.S.C. § 1983 cannot be used to enforce IDEA claims, nevertheless seek to obtain compensatory damages by captioning their unexhausted, untimely, and/or failed IDEA claims as claims for damages under Section 504 and the ADA. Petitioners should not be permitted to circumvent the IDEA's limited remedial scheme by recasting their failed IDEA claims as violations of Section 504 and the ADA. On these facts, the First Circuit's decision affirming the dismissal of the Petitioners' complaint for failure to state a claim under Section 504 or the ADA is consistent with decisions from other courts.

Finally, granting this Petition will not influence the outcome of this case. As the District Court noted, Petitioners were required to exhaust their administrative remedies. Petitioners' Appendix at 14, n. 3. Petitioners have not exhausted their

administrative remedies on some of their claims. *Id.* As to any claims for which exhaustion has occurred, administrative hearing officers have found in favor of the School District and determined that the School District provided Petitioners' children with the free appropriate public education ("FAPE") required by the IDEA. Petitioners should not be permitted to proceed with Section 504 or ADA claims that are based on the same set of facts as their failed IDEA claims.

REASONS FOR DENYING THE PETITION

I. Petitioners' Question Presented is Not the Issue Presented by the Facts of this Case.

Petitioners ask this Court to consider and decide whether the:

> parents of a child who has been identified as disabled under the IDEA can maintain a claim for compensatory damages under the Americans with Disabilities Act (42 U.S.C. § 12132 et seq.) and/or section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) for retaliatory-type conduct against them for their advocacy for their child's rights under the ADA, section 504, and the IDEA.

Petition for Writ of Certiorari ("Petition") at Question Presented. This question erroneously assumes that the Petitioners' complaint stated claims under Section 504 and the ADA. The District Court and the First Circuit both found that the Petitioners' complaint did not allege independent claims under Section 504 or the ADA. *See* Petitioners' Appendix at 1-16. These

decisions were based on a review of the factual allegations contained in Petitioners' complaint, and a determination that the Petitioners could "prove no set of facts in support of [their] claim that would entitle them to relief." Petitioners' Appendix at 6 (*quoting Stanton v. Metro Corp.*, 438 F.3d 119, 123-24 (1st Cir. 2006)).

The allegations in the complaint include the following: failure to obtain parental consent with respect to the educational placement of two of the Parents' daughters; failure to obtain parental participation in developing Individualized Education Programs ("IEP"); failure to obtain consent prior to providing special education services; failure to obtain an impartial hearing officer; improper maintenance of educational records; disagreements over evaluations; failure to provide FAPE with respect to an August 2004 administrative order; and, interference with an administrative due process hearing.[4] Petitioners' Appendix at 6-10.

Petitioners' complaint did not allege independent violations of the ADA or Section 504. Thus, the issue as stated in the Petition is not the issue presented by the facts of this case. Instead, the complaint, which prayed for relief in the form of compensatory damages, actually alleged violations of the IDEA. It was for that reason that the complaint was dismissed. *See Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955, 1964-65 (U.S. 2007)

---

[4] The alleged interference with an administrative due process hearing is pending in a separate matter before the United States District Court for the District of New Hampshire. *R.*, 05cv292-JL.

(Petitioners' "obligation to provide the 'grounds' of [their] 'entitle[ment] to relief' requires more than labels and conclusions. . . . Factual allegations must be enough to raise a right to relief above the speculative level.") (citation omitted). This case, which involves nothing more than a claim for damages for alleged violations of the IDEA, is not appropriate for further review.

II. The First Circuit's Decision is Correct and is Consistent with the Decisions of Other Circuits.

In *Diaz-Fonseca*, the First Circuit held that:

> Where the essence of the claim is one stated under the IDEA for denial of FAPE, no greater remedies than those authorized under the IDEA are made available by recasting the claim as one brought under . . . § 1983, . . . the ADA, or section 504.

451 F.3d at 19. Contrary to Petitioners' assertions, the First Circuit's decision does not "bar any claim under Section 504 or the ADA brought by a child or parent of a child identified under the IDEA." Petition at 23. Instead, the First Circuit's decision precludes parents from taking a second bite at the apple by recasting IDEA claims - for which compensatory damages are not available - as violations of Section 504 and ADA. Thus, in order to survive a motion to dismiss, parents seeking compensatory damages must allege independent causes of action under Section 504 and the ADA. *Diaz-Fonseca*, 451 F.3d at 29.

The First Circuit's application of its *Diaz-Fonseca* decision is consistent with decisions from other courts, including the Ninth Circuit's recent decision in *Mark H. v. Lemahieu*, 513 F.3d 922 (9th Cir. 2008). *Contra* Petition at 8-9. Petitioners' reference to the *Mark H.* case omits an important piece of the court's holding: the "availability of relief under the IDEA does not limit the availability of a damages remedy under § 504 for failure to provide the FAPE independently required by § 504 and its implementing regulations." *Mark H.*, 513 F.3d at 935 (emphasis added). The Ninth Circuit's holding is substantially similar to the First Circuit's *Diaz-Fonseca* holding, which permits parents to proceed with claims that "were already independently available through other sources of law." *Diaz-Fonseca*, 451 F.3d at 29 (emphasis added).

The cases that Petitioners assert to be more closely aligned with *Mark H.* than with *Diaz-Fonseca* have also involved independent claims under other federal statutes. Petition at 9-12. For example, in *M.P. v. Independent School District No 721*, the plaintiffs were permitted to proceed with a Section 504 claim because it was "wholly unrelated to the IEP process." 439 F.3d 865, 868 (8th Cir. 2006). Similarly, in *Ellenberg v. New Mexico Military Institute*, the Tenth Circuit reversed the district court's dismissal because the plaintiffs' Section 504 and ADA claims were "separate and distinct from the IDEA claim." 478 F.3d 1262, 1267 (10th Cir. 2007) (emphasis added). Contrary to Petitioners' assertion, these cases are consistent with the First Circuit's *Diaz-Fonseca* decision, and the First Circuit's application of *Diaz-Fonseca* does not preclude parents from bringing independent Section 504 or ADA claims. *Diaz-Fonseca*, 451 F.3d at 29. The

majority of the circuits agree with the First Circuit's conclusion that parents cannot proceed with Section 504 or ADA claims unless those claims are independent of the IDEA. Therefore, further review by this Court is not necessary. *See* SUP. CT. R. 10(a) (2007).

III. The First Circuit's Decision Conforms to the Accepted and Usual Course of Judicial Proceedings.

The Petitioners' assertion that the First Circuit's decision is contradictory to § 1415(*l*) of the IDEA belies the plain analysis of the *Diaz-Fonseca* court:

> We read the caveat set out in 20 U.S.C. § 1415(*l*) as intended to ensure that the IDEA does not restrict rights and remedies that were already independently available through other sources of law. Situations in which the caveat would be applicable surely exist, but this is not one of them. Plaintiffs' case turns entirely on the rights created by statute in the IDEA. . . . They . . . have no viable independent claim under Title II of the ADA or section 504 of the Rehabilitation Act.

Diaz-Fonseca, 451 F.3d at 29. As previously discussed, the *Diaz-Fonseca* decision is consistent with that of the other circuits. For the reasons that follow, it is also consistent with 20 U.S.C. § 1415(*l*), and it does not, as Petitioners' claim, constitute an implied repeal of the ADA or Section 504. The First Circuit has not departed from the acceptable and usual course of judicial proceedings. Therefore, there is no reason for

this Court to exercise its supervisory powers in this case.

Petitioners and the School District were involved in ten administrative proceedings over the course of sixteen months. At no time did any administrative hearing officer determine that the School District failed to provide any of Petitioners' children with FAPE. It would be illogical and a waste of valuable school district resources to permit parents to seek monetary damages under Section 504 or the ADA for IDEA-based claims when the school district has provided FAPE in accord with the IDEA. This is especially true when the Section 504 or ADA claims arise out of the same facts that have previously been adjudicated in the school district's favor.

Moreover, the requirement that a Section 504 or ADA claim be truly independent of IDEA claims is consistent with the IDEA's exhaustion requirement. 20 U.S.C. §§ 1415(i)(2),(*l*). Allowing parents to proceed with Section 504 or ADA claims that are related to, and depend on, IDEA rights would enable parents to easily circumvent the IDEA's exhaustion requirements, deluging the court with educational decision-making responsibility in situations where neither the IEP Team nor an administrative hearing officer have weighed in on the educational issues. Such a result would subvert the IDEA's exhaustion requirement, as well as the legislative intent of the IDEA itself. *See Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 62 (1st Cir. 2002) (discussing the exhaustion requirement vis a vis a § 1983 claim). To avoid this outcome, courts give "deference to the state agency's application of its specialized knowledge." *Lessard v.*

Wilton Lyndeborough Coop. Sch. Dist., 518 F.3d 18, 24 (1st Cir. 2008); *see also Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206 (1982) (noting that "due weight" should be given to administrative proceedings and that courts should not "substitute their own notions of sound educational policy for those of the school authorities which they review").

While § 1415(*l*) preserves the "rights, procedures, and remedies available under . . . the [ADA] . . . [and Section 504 of the] Rehabilitation Act," it was not intended to allow parties to seek compensatory damages by recasting their failed, unexhausted, and/or untimely IDEA claims as claims under either of those statutes. In cases such as these, where the School District has provided FAPE under the IDEA, courts agree that parents cannot take a second bite at the apple by seeking damages under Section 504 or the ADA, unless they have alleged a claim that is independent of their previously unsuccessful IDEA claims.[5] *See Sch. Dist. of Wis. Dells v. Z.S.*, 184 F.

---

[5] To the extent that either the *Mark H.*, 513 F.3d 922, or the *J.L. v. Ambridge Area School District*, No. 06-1652, 2008 WL 509230 (W.D. Pa. Feb. 22, 2008), cases may suggest that the failure to offer FAPE under the IDEA does not preclude parents from bringing claims for denial of FAPE under Section 504, it does not follow that when a district provides FAPE under the IDEA, parents may then raise a claim under Section 504 based on the same facts. *See* 34 C.F.R. § 104.33(b)(2) ("Implementation of an Individualized Education Program developed in accordance with the [IDEA] is one means of meeting the [Section 504 FAPE] standard"); 34 C.F.R. § 104.36 ("Compliance with the procedural

Supp. 2d 860, 884 (W.D. Wis. 2001) ("Because I conclude that plaintiff provided Z.S. with a free appropriate public education during the 1999-2000 school year, defendants' claim under the Rehabilitation Act fails necessarily"), *aff'd*, 295 F.3d 671 (7th Cir. 2002); *Moubry v. Indep. Sch. Dist. 696*, 9 F. Supp. 2d 1086, 1108-09 (D. Minn. 1998) (Parent "cannot establish a viable claim under the non-IDEA causes of action, where the predicate acts, upon which he has premised those claims, have withstood judicial review under the IDEA. . . . As a consequence, no viable claim can exist under [those] other statutory provisions, in the absence of a claim which, factually and legally, is distinct from those that have already been resolved under IDEA review") (internal quotations and citations omitted).

The *Diaz-Fonseca* holding does not prevent parents from bringing suit under Section 504 or the ADA. On the contrary, those causes of action continue to be available, provided the plaintiff alleges facts establishing claims that are independent of the IDEA. *Diaz-Fonseca*, 451 F.3d at 29. In this case, Petitioners did not allege independent Section 504 or ADA claims; consequently, the District Court properly dismissed the complaint. Petitioners' Appendix at 16.

Moreover, requiring parents to plead independent claims under Section 504 and the ADA does not, as Petitioners' claim, constitute an implied repeal of either of those statutes. Section 504 and the ADA

---

safeguards of section 615 of the [IDEA] is one means of meeting [Section 504's procedural safeguards] requirement").

continue to be available, provided that a plaintiff alleges facts sufficient to state a cause of action under either of those statutes. Petitioners' complaint was dismissed because they failed to state claims under Section 504 and the ADA. Petitioners' Appendix at 4, 12-15. By enacting 20 U.S.C. § 1415(*l*), Congress did not intend to allow plaintiffs to ignore well established legal principles requiring plaintiffs to allege "more than labels and conclusions." *Bell Atl. Corp.*, 127 S.Ct. at 1965.

The District Court dismissed Petitioners' complaint because it failed to allege Section 504 and ADA claims. The District Court found that allegations in the complaint pertained to the provision of a free appropriate public education as recognized by the IDEA. As Petitioners acknowledge, the circuit courts have uniformly held that compensatory damages are not available under the IDEA. Petition at 7, n. 1. In addition, the majority of appellate courts have held that § 1983 cannot be used to enforce the IDEA. *E.g., Blanchard v. Morton Sch. Dist.*, 509 F.3d 934, 938 (9th Cir. 2007) (joining "the First, Third, Fourth, and Tenth Circuits," in holding "that the comprehensive enforcement scheme of the IDEA evidences Congress' intent to preclude a *§ 1983* claim for the violation of rights under the IDEA"), *cert. denied*, 128 S. Ct. 1447 (U.S. 2008). At its core, this case turns on the availability of compensatory damages for violations of the IDEA. There is no dispute that compensatory damages are not available for violations of the IDEA. Thus, the First Circuit did not depart from the accepted and usual course of judicial proceedings and there is no issue for this Honorable Court to review.

IV. This Court Need Not Reach the Question Presented Because the Petitioners' Failure to Exhaust Their Administrative Remedies and Failure to Prevail at any Administrative Proceeding Provide Independent Bases for Dismissal.

Certiorari may be denied if the resolution of the issue would be irrelevant to the ultimate outcome of the case. *Monrosa v. Carbon Black Exp. Inc.*, 359 U.S. 180, 184 (1959) (this Court decides questions "in the context of meaningful litigation"). In this case, the Petitioners' failure to exhaust administrative remedies, and their failure to prevail on any of the administrative proceedings filed during the period of April 2004 through October 2005, provide an alternate basis for dismissal of their Complaint and denial of their Petition.[6]

A. Petitioners Have Failed to Exhaust Their Administrative Remedies.

Individuals must invoke the IDEA's administrative due process hearing procedures before filing an IDEA-based suit in federal court under Section 504 of the Rehabilitation Act, § 1983, or the Americans with

---

[6] If the decision of the First Circuit was reversed, the School District would be able to assert the defense of exhaustion of administrative remedies because it has not yet answered the Complaint. The School District would also be able to assert the defenses of res judicata and collateral estoppel, because some of the Petitioners' claims have previously been the subject of their unsuccessful administrative proceedings and no administrative tribunal has ruled that Petitioners' were prevailing parties.

Disabilities Act. 20 U.S.C. § 1415(*l*). *See Frazier*, 276 F.3d at 64 (plaintiffs who bring IDEA-based claims for monetary damages must exhaust administrative remedies "as a condition precedent to entering state or federal court"); *see also Cave v. E. Meadow Union Free Sch. Dist.*, 514 F.3d 240, 249 (2d Cir. 2008) ("IDEA's exhaustion rule applies to all of appellants' federal causes of action regardless of their statutory bases"); *J.P. v. Cherokee County Bd. of Educ.*, 218 Fed. App'x 911, 913-14 (11th Cir. 2007) (affirming dismissal of Section 504, ADA, and IDEA claims for failure to exhaust administrative remedies because the "alleged injuries *primarily* relate to the provision of . . . FAPE [pursuant to the requirements of the IDEA]") (italics in original); *M.T.V. v. DeKalb County Sch. Dist.*, 446 F.3d 1153, 1158-59 (11th Cir. 2006) ("retaliation claims clearly relate to [student's] evaluation and education, and, therefore, are subject to the [IDEA's] exhaustion requirement); *Charlie F. v. Bd. of Educ. of Skokie Sch. Dist. 68*, 98 F.3d 989, 992 (7th Cir. 1996) ("the theory behind the grievance may activate the IDEA's [exhaustion] process, even if the plaintiff wants a form of relief that the IDEA does not supply"). As the First Circuit has noted, the "statutory exhaustion requirement means that a party must exhaust all available avenues of administrative review regardless of whether the administrative process offers the particular type of relief that is being sought." *Frazier*, 276 F.3d at 62.

As to certain of their allegations, Petitioners did not request an administrative hearing prior to filing their Complaint in the District Court. Petitioners' Appendix at 14, n.3 (District Court Order of January 29, 2007); Appendix at 7b-8b (District Court Order of

May 15, 2006, 05cv292-JL); *see also Jeremy H. v. Mount Lebanon Sch. Dist.*, 95 F.3d 272, 283 (3d Cir. 1996) (affirming dismissal of claims for failure to exhaust administrative remedies because the claims were based on events that occurred after the conclusion of the state administrative proceeding). Accordingly, the Petitioners' failure to exhaust administrative remedies provides an alternate basis for this Court to deny the Petition for Certiorari.

B. Petitioners are not a Prevailing Party in Any Administrative Proceeding.

The Petition should also be denied based on the Petitioners' failure to prevail at any administrative proceeding. Under the IDEA, courts may award attorney's fees "to a prevailing party who is the parent of a child with a disability." 20 U.S.C. § 1415(i)(3)(B)(i)(II); *see also Smith v. Fitchburg Pub. Schs.*, 401 F.3d 16, 22 (1st Cir. 2005) (parents prevail when they "'receiv[e] a judgment on the merits or obtai[n] a court-ordered consent decree'") (*quoting Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001)). A party prevails when he obtains relief that materially alters his relationship with the defendant. *Kathleen H. v. Mass. Dep't of Educ.*, 154 F.3d 8, 14 (1st Cir. 1998) (citations omitted). The relief obtained must involve a significant claim in the litigation, and there must be more than a de minimis alteration in the relationship. *Id.*

To date, no administrative tribunal has ever found that the Petitioners were the prevailing party on any IDEA claims. Instead, administrative hearing officers

have found that the School District met its obligations under the IDEA. Petitioners cannot proceed with Section 504 and ADA claims that are based on the same underlying facts as their failed IDEA claims. *See Sch. Dist. of Wis. Dells*, 184 F. Supp. 2d at 884 ("Because I conclude that [the District] provided Z.S. with a free appropriate public education during the 1999-2000 school year, defendants' claim under the Rehabilitation Act fails necessarily"), *aff'd*, 295 F.3d 671 (7th Cir. 2002); *Moubry*, 9 F. Supp. 2d at 1108-09 ("Notwithstanding a plaintiff's ability to proceed simultaneously with IDEA and other statutory claims, he cannot establish a viable claim under the non-IDEA causes of action, where the predicate acts, upon which he has premised those claims, have withstood judicial review under the IDEA") (internal quotations and citations omitted).

To the extent that Petitioners have alleged retaliation, the allegations, which have not been the subject of an administrative proceeding, "are closely related to the identification, evaluation, and educational placement of their children for purposes of achieving a free and appropriate public education." Petitioners' Appendix at 13 (District Court Order of January 29, 2007). This claim is necessarily barred by Petitioners' failure to prevail on any of the previous IDEA administrative proceedings. *See Lauren W. v. Deflaminis*, 480 F.3d 259, 274 (3d Cir. 2007) ("[I]n this case, the [District]. . . provided Lauren with a FAPE and thus satisfied the District's obligations [under Section 504]"); *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 293 (5th Cir. 2005) ("the accessibility issue Pace litigated in his IDEA case and lost is the same issue he sought to litigate in his ADA/504 claim. The

district court correctly concluded that Pace was precluded from relitigating this issue"); *Indep. Sch. Dist. No. 283 v. S.D.*, 88 F.3d 556, 562 (8th Cir. 1996) (student's non-IDEA claims . . . are precluded by the IDEA judgment in the School District's favor"); *Marc V. v. N.E. Indep. Sch. Dist.*, 455 F. Supp. 2d 577, 597-98 (W.D. Tex. 2006) ("Since Defendants complied with the IDEA during the relevant time period, Plaintiffs cannot prevail on their derivative Section 1983, Section 504 and ADA claims as a matter of law"), *aff'd*, 242 Fed. App'x 271 (5th Cir. 2007).

The above cited decisions are consistent with §§ 104.33 and 104.36 of title 34 of the Code of Federal Regulations. Under § 104.33, "implementation of an Individualized Education Program developed" in accord with the IDEA is one means of meeting the Rehabilitation Act's free, appropriate public education standard. 34 C.F.R. § 104.33(b)(2). Similarly, § 104.36 states that compliance with the procedural safeguards in section 615 of the IDEA is one means of meeting the Section 504 requirements pertaining to procedural safeguards. 34 C.F.R. § 104.36.

As to the claims that Petitioners have exhausted, administrative hearing officers have held that the School District met its duties under the IDEA. Thus, Petitioners are not a prevailing party. This provides an independent basis for dismissal of the Petitioners' Section 504 and ADA claims.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Dated: May 15, 2008

Respectfully submitted,

BROOKLINE SCHOOL DISTRICT

By its attorneys,

Dean B. Eggert, Esq.,
Counsel of Record
Alison M. Minutelli, Esq.
Wadleigh, Starr & Peters, P.L.L.C.
95 Market Street
Manchester, New Hampshire 03101
(603) 669-4140

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
District New Hampshire

Civil Action No: 1:05-cv-292-SM

[Filed May 3, 2006]

Kasenia R., by and through her parents and next best friend, M.R. and C.B.	)
Plaintiffs	)
v.	)
Brookline School District	)
Defendants	)

MOTION FOR LEAVE TO AMEND COMPLAINT

Pursuant to Federal Rules of Civil Procedure 15(a) and (d), Plaintiffs move the Court for leave to file the attached Amended Complaint following the hearing officer's decision in the reopening of the Administrative Record dated January 3, 2006 which was received by Plaintiffs on January 12, 2006.

Rule 15(a) of the Federal Rules of Civil Procedure requires leave be "freely given when justice so requires." Rule 15(d) allows for "supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented."

May 3, 2006

Respectfully submitted,

By: /s/ Theresa Kraft
Theresa Kraft, Bar # 15851
Kraft Law, P.L.L.C.
10 Ferry Street
Concord, New Hampshire 03301
Telephone: (603) 225-7555

UNITED STATES DISTRICT COURT
District New Hampshire

Civil Action No: 1:05-cv-292-SM

[Filed May 4, 2006]

Kasenia R., by and through her parents and next best friend, M.R. and C.B.	)
Plaintiffs	)
v.	)
Brookline School District	)
Defendants	)

[p. 1]

AMENDED COMPLAINT
INTRODUCTION

1. This is an appeal from two administrative decisions under the Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et. seq.* (IDEA) issued on May 24, 2005 and January 3, 2006, in which the hearing officer denied parents' request for reimbursement of the costs associated with the unilateral placement of their daughter, Kasenia R. in a private special education placement . . .

* * *

FIFTH CAUSE OF ACTION

138. Plaintiffs reallege and incorporate by reference paragraphs 1 through 137 above.

139. The school district has retaliated against Parents for attempting to assert their legal rights. The school district, through counsel and directly, spread false and damaging rumors about parents, inundated parents with lengthy, legalistic letters, misrepresented and distorted facts, inappropriately threatened truancy charges, presented false and misleading information regarding the district's evaluation policy, drove away evaluators, and incorporated duplicative and overly inclusive documentation as evidence in due process hearings. The May 2005 hearing alone includes some 7500 pages of exhibits, well over 75% of which was filed by the school district. The school district stalled the IEP process and attempted to wear the parents into submission. This

[p. 28]

retaliation is in violation of Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act.

140. Plaintiffs are not required to raise section 504 claims or ADA claims during the hearing process, but were required to exhaust administrative remedies available under the IDEA. This complaint is an appeal from two due process hearing decisions; plaintiffs have therefore exhausted their IDEA administrative remedies as required by 20 U.S.C. § 1415(1). *See* Mr.

and Mrs. I v. Maine School Administrative District 55, 416 F. Supp. 2d 147 (D. Me. 2006)

WHEREFORE, the plaintiffs pray for the following relief:

1. Allow plaintiffs to admit additional evidence into the record, specifically, testimony from Dr. Afshar and documentary evidence from Dr. Blom, Dr. Willis, Dr. Goodall and Dr. Yardley, evidence pertinent to Candace Lambert's lack of credentials and false statements, and records from the 2005-2006 school year.

2. Reverse the hearing officer's decisions of May 2005 and January 2006.

3. Award Parents reimbursement of the costs of Kasey's unilateral placement at Dr. Franklin Perkins School, plus pre-judgment and post-judgment interest at an appropriate rate;

4. Award Parents damages in an amount that is reasonable pursuant to section 504 and the ADA;

5. Determine that parents are the prevailing party;

6. Award attorneys fees for the administrative due process hearings and this action;

|p. 29|

7. Award such further relief as the Court may deem just and proper.

May 3, 2006

Respectfully submitted,

By: /s/ Theresa Kraft
Theresa Kraft, Bar # 15851
Kraft Law, P.L.L.C.
10 Ferry Street
Concord, New Hampshire 03301
Telephone: (603) 225-7555

I certify that on this 3rd day of May 2006, I served the within Amended Complaint on defendant's attorney, Dean B. Eggert, Esq., Wadleigh, Starr & Peters, in the manner specified herein: electronically served through ECF.

May 3, 2006

/s/ Theresa Kraft
Theresa Kraft, Bar # 15851
Kraft Law, P.L.L.C.
10 Ferry Street
Concord, New Hampshire 03301
Telephone: (603) 225-7555

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Civil No: 05-cv-292-SM

[Filed May 15, 2006]

M.R. and C.B.	)
	)
v.	)
	)
Brookline School District	)
	)

ORDER

Re: Document No. 18, *Motion For Leave To File Amended Complaint*

Ruling: Plaintiffs are granted permission to amend the complaint only as it relates to matters addressed in the January 2006 proceeding but are denied permission to introduce other new issues not raised at either hearing. Plaintiffs must submit a complaint which complies with this order. The "Candice Lambert" false testimony claim was the crux of the January reopening and may be added by amendment.

/s/
James R. Muirhead
U.S. Magistrate Judge

Date: May 15, 2006

cc: Dean B. Eggert, Esq.
Theresa Kraft, Esq.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT NEW HAMPSHIRE

Civil No. 05-cv-292-SM

[Filed August 22, 2007]

K.R., by and through her parents and next best friend, M.R. and C.B., Plaintiff	)
v.	)
Brookline School District Defendant	)

ORDER

Kasenia R., through her parents, brings this civil action against the Brookline School District, pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, et seq. Specifically, plaintiffs appeal an administrative decision issued by the New Hampshire Department of Education denying their request for reimbursement of the costs associated with their unilateral placement of Kasenia in a private school.

The School District moves to dismiss plaintiffs' amended complaint, asserting that it has been prejudiced by plaintiffs' inexcusable delay in filing that pleading (plaintiffs waited more than six months after the court granted them leave to amend before filing the amended complaint). Additionally, the School District says the amended complaint fails to comply with the court's order granting plaintiffs leave to amend. *See* Order dated May 15, 2006 (document no. 20) (granting plaintiffs "permission to amend the complaint only as it relates to matters addressed in the January 2006 proceeding but [denying] permission to introduce other new issues not raised at either hearing."). Plaintiffs have not objected.

The School District is correct in claiming that the amended complaint fails to comply with the court's order. Specifically, it references matters that were not within the scope of the original administrative hearing or the rehearing. The School District's motion is, therefore, granted to the extent it moves the court to strike plaintiffs' amended complaint.

The School District also moves to strike plaintiffs' response to its decision memorandum as untimely. While plaintiffs seem to have waited an undue amount of time before filing that response, their delay does not appear to have prejudiced the School District in any way. That motion is, then, denied.

Conclusion

The School District's unopposed motion to dismiss plaintiffs' amended complaint (document no. 57) is granted to the extent it moves the court to strike that

pleading. Plaintiffs' amended complaint (document no. 55) shall be stricken. The School District's motion to strike plaintiffs' response to its decision memorandum (document no. 64) is denied.

SO ORDERED.

/s/
Steven J. McAuliffe
Chief Judge

August 22, 2007

cc: Theresa Kraft, Esq.
Dean B. Eggert, Esq.

94

(3)

FILED
JUN 10 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-1175

In The
Supreme Court of the United States

CATHERINE BURKE and MIKAEL ROLFHAMRE,
Petitioners,

v.

THE BROOKLINE SCHOOL DISTRICT,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENT'S SUPPLEMENTAL BRIEF

DEAN B. EGGERT, ESQ.
Counsel of Record
ALISON M. MINUTELLI, ESQ.
WADLEIGH, STARR & PETERS, P.L.L.C.
95 MARKET STREET
MANCHESTER, NH 03101
(603) 669-4140

Attorneys for Respondent

June 10, 2008

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

Table of Authorities ii

Respondent's Supplemental Brief 1

Conclusion 3

TABLE OF AUTHORITIES

Cases

Burke v. Brookline Sch. Dist.,
257 Fed. App'x 335 (1st Cir. 2007) 3

Diaz-Fonseca v. Puerto Rico,
451 F.3d 13 (1st Cir. 2006) 1, 2

M.M.R.-Z. v. Puerto Rico,
___ F.3d ___, 2008 WL 2285185
(1st Cir. June 5, 2008) 1, 2

Statutes

20 U.S.C. § 1400, *et seq.* 1

29 U.S.C. § 794 1

42 U.SC. § 12132, *et seq.* 1

Rules

Supreme Court Rule 15.8 1

RESPONDENT'S SUPPLEMENTAL BRIEF

Pursuant to Supreme Court Rule 15.8, the Brookline School District ("School District") respectfully submits this Supplemental Brief in Opposition to the Petition for Certiorari, to bring to the Court's attention new authority that casts further doubt on the need for review in this case.

On June 5, 2008, the United States Court of Appeals for the First Circuit filed a decision in the case of *M.M.R.-Z. v. Puerto Rico*, ___ F.3d ___, 2008 WL 2285185 (1st Cir. June 5, 2008). The *M.M.R.-Z.* case illustrates that the First Circuit will allow plaintiffs to proceed with claims for damages under the Americans with Disabilities Act, 42 U.SC. § 12132 *et seq.* ("ADA") and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504"), when they are truly independent of the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et. seq.* ("IDEA"). As this is a new case, it was not available at the time the Respondent filed its Brief in Opposition.

In *M.M.R.-Z.*, the First Circuit rejected the defendants' argument that the plaintiff's claims for damages under Section 504, ADA, and Title IX were barred based on § 1415(*l*) of the IDEA. *M.M.R.-Z.*, ___ F.3d ___, 2008 WL 2285185, **3-4. The court noted that, "on its face, IDEA does not preclude claims against the Commonwealth, or the individual defendants, under the ADA, the Rehabilitation Act or (arguably) Title IX as applied to a disabled child." *Id.* at *4. The court then distinguished *Diaz-Fonseca*, noting that although it has "held that relief under these other statutes is not available where '[p]laintiffs'

case turns entirely on the rights created by statute in the IDEA,' . . . here plaintiffs' claim is 'independently available through other sources of law,' namely the retaliation provisions of the three statutes here invoked." *Id.* (quoting *Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 29 (1st Cir. 2006). M.M.R.-Z.'s claims "rest[ed] on improper retaliatory intent, [were] by no means mirrors of the IDEA, and [were] not within the rationale of *Diaz-Fonseca*." *Id.*

Contrary to Petitioners' assertions, it is clear from the *M.M.R.-Z.* decision that the First Circuit is not interpreting its *Diaz-Fonseca* holding in a manner that would preclude plaintiffs from seeking compensatory damages under Section 504 or the ADA. *See* Petition at 8. Instead, the *M.M.R.-Z.* decision indicates that the First Circuit will interpret *Diaz-Fonseca* in a manner that is consistent with § 1415(*l*) of the IDEA, as well as with the decisions from other circuits. ___ F.3d ___, 2008 WL 2285185, *4.

The *M.M.R.-Z.* case illustrates that the First Circuit, like the other circuit courts, will allow plaintiffs to proceed with claims for damages if the claims are truly independent of the IDEA. *Id.* The courts below found that Petitioners did not allege independent ADA or Section 504 claims; accordingly, their complaint, which sought compensatory damages, was dismissed in accord with *Diaz-Fonseca*. *See* Appendix to Petition for Writ of Certiorari ("Petitioners' Appendix") at 14-15 (District Court Order of January 29, 2007) (Petitioners "do not allege an independent claim under the ADA but instead allege an IDEA-based claim in the guise of the ADA. . . . [T]he Rehabilitation Act does not provide a

separate and independent cause of action for the [Petitioners'] claim based upon the cited regulations"); *see also Burke v. Brookline Sch. Dist.*, 257 Fed. App'x 335 (1st Cir. 2007) (summarily affirming the district court's decision "under *Diaz-Fonseca*. . . .").

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Dated: June 10, 2008

Respectfully submitted,

BROOKLINE SCHOOL DISTRICT

By its attorneys,

Dean B. Eggert, Esq.,
Counsel of Record
Alison M. Minutelli, Esq.
Wadleigh, Starr & Peters, P.L.L.C.
95 Market Street
Manchester, New Hampshire 03101
(603) 669-4140

94

(5)

FILED
JUN 11 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07- 1175

In The
Supreme Court of the United States

CATHERINE BURKE and MIKAEL ROLFHAMRE,
PETITIONERS,

v.

THE BROOKLINE SCHOOL DISTRICT,
RESPONDENT.

On Petition for a Writ Of Certiorari to the United States Court of Appeals for the First Circuit

SUPPLEMENT TO REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMIE N. HAGE, ESQ.
Counsel of Record
NIXON PEABODY LLP
100 Summer Street
Boston, MA 02110
(617) 345-1000
Attorney for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

Page

I. THE FIRST CIRCUIT'S NEW RULING COMPLETELY UNDERMINES ITS SUMMARY AFFIRMANCE IN THE PRESENT CASE. 2

II. THE NEW RULING COMPLETELY UNDERMINES THE FIRST CIRCUIT'S PRIOR PRECEDENT. 5

III. THE PETITIONERS' COMPLAINT WOULD SURVIVE UNDER M.M.R.-Z. 7

A. Petitioners' Claims Do Not 'Turn Entirely on the Rights Created by Statute in the IDEA'. 7

B. Petitioners' Claims Are 'Independently Available Through Other Sources of Law.' 9

IV. THE COURT MUST CLARIFY THESE UNRESOLVED QUESTIONS OF LAW. 11

CONCLUSION 12

TABLE OF AUTHORITIES

FEDERAL CASES

Diaz-Fonseca v. Puerto Rico, 451 F.3d 13 (1st Cir. 2006)..... 1, 2, 4, 5, 6, 7, 9, 10, 11

M.M.R.-Z. v. Puerto Rico, No. 07-2025, 2008 U.S. App. Lexis 11977 (1st Cir. June 5, 2008).... ..... 1, 2, 4, 5, 6, 7, 9, 10, 11

Nieves-Marquez v. Puerto Rico, 353 F.3d 108 (1st Cir. 2003)..... 4

Posadas v. National City Bank, 296 U.S. 497 (1936) 6

Rancho Palos Verdes v. Abrams, 544 U.S. 113 (2005). 6

STATUTES

20 U.S.C. § 1400 et seq. 1

20 U.S.C. § 1415(1).....2, 3, 4, 5, 6, 9, 11

29 U.S.C. § 794..... 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11

42 U.S.C. § 1983.....6

42 U.S.C. § 12132 et seq. 1

42 U.S.C. § 12203... 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11

FURTHER REASONS FOR GRANTING THE WRIT

Since the submission of the Petitioners'[1] Reply to the Opposition to Petition of Writ of Certiorari, the United States Court of Appeals for the First Circuit has issued another controversial opinion in the area of Rehabilitation Act and Americans with Disabilities Act law, M.M.R.-Z. v. Puerto Rico, which at once severely undermines the First Circuit's summary affirmance in the present case, upends the principle for which the First Circuit precedent stood, and compels this Court to grant the Writ for Certiorari for the present case as the only way to avoid widespread confusion within the First Circuit and across Circuits. M.M.R.-Z. v. Puerto Rico, No. 07-2025, 2008 U.S. App. Lexis 11977, at *1 (1st Cir. June 5, 2008).

---

[1] Petitioners Catherine Burke and Mikael Rolfhamre (the "Parents") are the parents of three children identified by the Brookline School District (the "School District") as students in need of special education under the Individuals with Disabilities Education Act ("IDEA") (20 U.S.C. § 1400 et seq.). Each of the children is also an individual with a disability under the Americans with Disabilities Act ("ADA") (42 U.S.C. § 12132 et seq.) and a handicapped person as defined by section 504 of the Rehabilitation Act of 1973 ("Section 504") (29 U.S.C. § 794).

Therefore, Petitioners hereby supplement their Reply to Respondent's Opposition Brief, pursuant to Rule 15.8.

I. THE FIRST CIRCUIT'S NEW RULING COMPLETELY UNDERMINES ITS SUMMARY AFFIRMANCE IN THE PRESENT CASE.

Petitioners have consistently maintained that the First Circuit's application of its Diaz-Fonseca precedent to this case is inappropriate not only because Diaz-Fonseca itself constitutes a misreading of the Section 1415(l) that puts the First Circuit at odds with every other Circuit that has decided the question, but also because the issues of fact and law in this case are distinguishable from those addressed by Diaz-Fonseca. Diaz-Fonseca v. Puerto Rico, 451 F.3d 13 (1st Cir. 2006).

In Diaz-Fonseca, the First Circuit held that "[w]here the essence of the claim is one stated under the IDEA for denial of FAPE [("free appropriate public education" guaranteed by the IDEA)], no greater remedies than those authorized under the IDEA are made available by recasting the claim as one brought under . . . Title II of the ADA[] or section 504 of the Rehabilitation Act." Id. at 19.

The First Circuit relied upon Diaz-Fonseca to affirm the dismissal of the Petitioners' Complaint despite the fact that the claims were brought neither "under the IDEA" nor "for the denial of FAPE," but rather for compensatory damages suffered by the Petitioners because of the retaliatory conduct visited

upon them by the School District in clear violation of Section 504 of the Rehabilitation Act and the Americans with Disabilities Act.

The First Circuit has now flatly contradicted its holding in Diaz-Fonseca. M.M.R.-Z., 2008 U.S. App. Lexis 11977, at *3. M.M.R.-Z. completely undermines the principle upon which the First Circuit originally agreed to summarily affirm the district court in the present case. Id.

In M.M.R.-Z. the court upheld parents' claim to relief under Section 504 and the ADA for damages they suffered on account of retaliation carried out by a school district to prevent them from advocating for their children's rights under the IDEA. Id. In explaining the impact on the defendants' sovereign immunities defenses, the court explained the effect of the Section 1415(l) saving clause:

> We turn now to the defendants' claim that, in addition, sovereign immunity defeats retaliation claims against the Commonwealth and the official capacity defendants based on three other statutes: the ADA, the Rehabilitation Act and Title IX. Defendants argue that Mario's claim based on delay in providing him special education services after Rivera-Lugo's departure is cognizable only under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1415, and that the IDEA does not provide for the tort-like damages here sought, Nieves-Marquez v. Puerto Rico, 353 F.3d 108, 124 (1st Cir. 2003);

alternatively, they argue that plaintiffs were required to resort to administrative remedies before pursuing their IDEA-like claim. See 20 U.S.C. § 1415(l). [...]

Although the IDEA preemption claim is thus before us, it lacks merit. IDEA itself provides that

> [n]othing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities.

20 U.S.C. § 1415(l). Thus, on its face IDEA does not preclude claims against the Commonwealth, or the individual defendants, under the ADA, the Rehabilitation Act or (arguably) Title IX as applied to a disabled child.

While we have held that relief under these other statutes is not available where "[p]laintiffs' case turns entirely on the rights created by statute in the IDEA," Diaz-Fonseca v. Puerto Rico, 451 F.3d 13, 29 (1st Cir. 2006), here plaintiffs' claim is "independently available through other sources of law," namely, the retaliation provisions of the three statutes here invoked. These claims rest on improper retaliatory intent, are by no means

mirrors of the IDEA, and are not within the rationale of Diaz-Fonseca.

Id. at *8-11.

This decision directly contradicts the First Circuit's summary affirmance of the present action because Petitioners' Complaint does not "turn entirely on the rights created by statute in the IDEA", and the claims are "independently available through other sources of law." Therefore, Petitioners' Complaint does not fall within the rationale of Diaz-Fonseca. The Petitioner's case would survive the motion to dismiss under the now-controlling M.M.R.-Z. holding.

While this Court should grant certiorari to resolve the split within the First Circuit presented by M.M.R.-Z., it must, alternatively, at the very least, remand the present Petition for further consideration in light of this new holding, as the current Petitioners' Complaint fits squarely under M.M.R.-Z.

II. THE NEW RULING COMPLETELY UNDERMINES THE FIRST CIRCUIT'S PRIOR PRECEDENT.

The M.M.R.-Z. holding itself flatly contradicts the Diaz-Fonseca precedent in that it holds that, "Thus, on its face IDEA does not preclude claims against the Commonwealth, or the individual defendants, under the ADA, the Rehabilitation Act or (arguably) Title IX as applied to a disabled child,"

whereas Diaz-Fonseca held that such claims can be barred and refused to recognize the Section 1415(1) savings clause which M.M.R.-Z. cites approvingly as its basis for allowing the parental claims to survive. Id. at *8.

Diaz-Fonseca's admonitions that "where the essence of the claim is one stated under the IDEA for denial of FAPE, no greater remedies than those authorized under the IDEA are made available by recasting the claim as one brought under 42 U.S.C. 1983, Title II of the ADA, or section 504 of the Rehabilitation Act" and that "[n]o general compensatory damages may be awarded in such a suit regardless of which of the causes of action listed above [42 U.S.C. 1983, Title II of the ADA, or section 504] is invoked" represented an improper repudiation of the statutory intent of the Section 1415(1). Diaz-Fonseca, 451 F.3d at 19. The case effected an implied repeal of the savings clause, even though such an approach contravened the longstanding principles of statutory construction endorsed by the Court in Posadas v. National City Bank, 296 U.S. 497, 503 (1936) and recently reinforced in Rancho Palos Verdes v. Abrams, 544 U.S. 113 (2005).

Diaz-Fonseca constituted a nullification of Petitioners' rights, and conflicted not only with section 1415(l)'s plain language and legislative history but also with important decisions of this Court.

M.M.R.-Z. now seems to indicate that the First Circuit will recognize the effect of the Section 1415(l) savings clause in some circumstances, but it has not explicitly overruled the implied repeal that Diaz-Fonseca represents.

III. THE PETITIONERS' COMPLAINT WOULD SURVIVE UNDER M.M.R.-Z.

Petitioners' Complaint would survive under the M.M.R.-Z. standard, because it does not "turn entirely on the rights created by statute in the IDEA", and the claims are "independently available through other sources of law." M.M.R.-Z., 2008 U.S. App. Lexis 11977, at *11.

A. Petitioners' Claims Do Not 'Turn Entirely on the Rights Created by Statute in the IDEA'.

Petitioners' claims do not "turn entirely" – or in fact hinge at all – "on the rights created by statute in the IDEA". Id. Plaintiffs' claims are for separate and distinct retaliatory conduct.

Petitioners' pro se Complaint alleges, inter alia, that the School District has discriminated, retaliated, interfered with, coerced, and intimidated Petitioners because of Petitioners' advocacy for their children. It is this retaliatory conduct toward the Parents that is the basis for the compensatory damages claim. Specifically, the Complaint contains highly detailed allegations regarding the School

District's activities against the Parents in response to their advocacy on behalf of their children.

In their Complaint, appellants set forth myriad allegations of occasions when the School District attempted to coerce, intimidate, interfere with, and retaliate against appellants for their advocacy on behalf of their children. Among such contentions were those alleging that the School District: denied procedural safeguards guaranteed by the ADA and Section 504; interfered with appellants' ability to exercise rights secured by the ADA and their right to assist their disabled children in obtaining and enjoying rights secured by both the ADA and Section 504; interfered with access to dispute resolution procedures required by Section 504; and retaliated against the appellants by spreading false and damaging rumors, making excessive and indeed oppressive demands for medical and mental health records, and imposing policies to limit access to independent evaluators.

Even if the School District had provided FAPE to the Petitioners' children, (which the Respondent suggests and the Petitioners deny) this would have no affect on the viability of Petitioners' claims for retaliation under the ADA and Section 504. If the Petitioners had reached their objective in fulfilling their children's right to FAPE from the School District, the Parents would still have a claim for compensatory damages based on retaliation and discrimination under the ADA and Section 504. The claims before this Court are for the harm suffered by the Parents because of the School District's

retaliatory conduct in response to their advocacy. The claims are not predicated on FAPE deprivations.

B. Petitioners' Claims Are 'Independently Available Through Other Sources of Law.'

Petitioners' claims are, as M.M.R.-Z. requires, "independently available through other sources of law." Id. at *11.

The Petitioners are not bringing their claims under the IDEA. They do not base their claims on a denial of FAPE, nor do they seek the kind of relief that could be granted through any IDEA administrative hearing, or through any other education-related injunctive relief. Petitioners were harassed and intimidated as parents and therefore seek monetary relief. Their claims have no counterparts in IDEA, and are brought under the separate and independent causes of action under the ADA and Section 504.

Petitioners allege their injuries under Title V of the ADA, which prohibits retaliation, interference, coercion, or intimidation. 42 U.S.C. § 12203. Petitioners allege that they suffered this discrimination because they opposed the unlawful actions taken by the School District. The harm of which the Petitioners complain is based on the acts covered by local government action and public accommodation provisions of the ADA, at Titles II and III.

Section 504 of the Rehabilitation Act which prohibits discrimination and exclusion from federally funded programs. 29 U.S.C. § 794. Petitioners' claim that the harassment, discrimination, and other actions carried out against them by the School District violated their civil rights under this Section.

These violations are closely akin to the kind of retaliation described in M.M.R.-Z. Id. at *2 ("Mario, together with his parents and grandmother, then filed suit in federal district court based on the abuse he suffered and the alleged deprivation of educational services in the year-long period following Rivera-Lugo's termination").

The only difference is that the Petitioners in the current action have gone *further* to meet their burden than did the plaintiffs in M.M.R.-Z., whose claim was allowed to reach summary judgment: "In opposing summary judgment on the retaliation claim, the plaintiffs baldly asserted that the delay in furnishing services was based on retaliatory animus but without citing *any* evidence in the record to support such an assertion." Id. at *6-7. (emphasis in the original). Here, Petitioners' Complaint includes substantive details of the situations in question, and, should this Writ of Certiorari be granted and Petitioners be allowed to reach the merits, would provide strong evidence of the claims they allege.

While this Court should grant certiorari to resolve these contradictory rulings, Petitioners request, in the alternative, that the present Petition

be remanded to the First Circuit for further proceedings based on the holding of M.M.R.-Z..

IV. THE COURT MUST CLARIFY THESE UNRESOLVED QUESTIONS OF LAW.

Unless this Court grants the Petition for Writ of Certiorari to resolve these discrepancies, M.M.R.-Z. will be the first of many ad hoc attempts, both within the First Circuit and outside it, to try to sidestep Diaz-Fonseca. Such confusion will lead to disparate treatment of parents who happen to bring their claims in different judicial Circuits.

Because M.M.R.-Z. v. Puerto Rico, has contradicted direct First Circuit precedent in Diaz-Fonseca, and because Diaz-Fonseca already refuses to recognize the statutory effect of Section 1415(l), this Court must resolve the conflict between the First Circuit, the intent of Congress, and its sister Circuits. Unless the Court rejects the present summary affirmance under Diaz-Fonseca, the First Circuit will maintain an unique and unfairly burdensome standard for the parents of disabled children who have been retaliated against by school districts, and Petitioners' claim will have been improperly dismissed in light of M.M.R.-Z.

CONCLUSION

For these reasons, and especially in light of this new holding from the First Circuit, Petitioners respectfully request that this Court grant their Petition for Writ of Certiorari to review the questions presented in this appeal.

Dated: June 11, 2008

Respectfully submitted,

NIXON PEABODY LLP

Jamie N. Hage, Esq.
Counsel of Record
100 Summer Street
Boston, Massachusetts 02110
(617) 345-1000
Attorney for Petitioners

94

No. - 07-1175

FILED
JUN 3 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

CATHERINE BURKE and MIKAEL ROLFHAMRE,
PETITIONERS,
v.
THE BROOKLINE SCHOOL DISTRICT,
RESPONDENT.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMIE N. HAGE, ESQ.
Counsel of Record
NIXON PEABODY LLP
100 Summer Street
Boston, MA 02110
(617) 345-1000
Attorney for Petitioners

Blanchard Press, Inc. - Boston, MA 02210 - 617-426-6690

TABLE OF CONTENTS

Page

I. THE SCHOOL DISTRICT'S OPPOSITION BRIEF IGNORES THE PARENTS' RETALIATORY CLAIMS BROUGHT UNDER SECTION 504 AND THE ADA. ...2

II. PETITIONERS WERE NOT REQUIRED TO EXHAUST ADMINISTRATIVE REMEDIES. 3

A. Petitioners' Retaliatory Claims Under ADA and Section 504 do not Require Exhaustion of Administrative Remedies. 3

B. Because Petitioners' Retaliatory Claims were not FAPE-Based, They Were not Required to Exhaust Such Claims at the Administrative Level. 5

C. The Court Should Disregard The School District's Reference to the Administrative Record....6

III. THE QUESTION BEFORE THIS COURT IS ONE OF PURE STATUTORY INTERPRETATION. 8

CONCLUSION.....12

TABLE OF AUTHORITIES

FEDERAL CASES

Adashunas v. Negley, 626 F.2d 600 (7th Cir. 1980) 5

Cable v. Dep't of Developmental Servs., 973 F. Supp. 937 (C.D. Cal. 1997), rev'd on other grounds, Cable v. Dep't of Developmental Servs., 54 Fed. Appx. 263 (9th Cir. 2002) 3, 4

Diaz-Fonseca v. Puerto Rico, 451 F.3d 13 (1st Cir. 2006)..... 8, 9, 10, 11

Freed v. CONRAIL, 201 F.3d 188 (3d Cir. 2000) 4

McInerney v. Rensselaer Polytechnic Inst., 505 F.3d 135, 138 (2d Cir. 2007) 3

Mark H. v. Lemahieu, 513 F.3d 922 (9th Cir. 2008) 8, 9, 10

M.T.V. v. DeKalb County Sch. Dist., 446 F.3d 1153 (11th Cir. 2006) 5

N.B. v. Alachua County Sch. Bd., 84 F.3d 1376 (11th Cir. 1996) 5

Padilla v. School Dist. No. 1, 233 F.3d 1268, 1274 (10th Cir. 2000) 5, 6

Pendleton v. Jefferson Local School Dist. Bd. of Educ., 1992 U.S. App. Lexis 6294 (6th Cir. 1992) 4, 5

Posadas v. National City Bank, 296 U.S. 497 (1936) 11

Rancho Palos Verdes v. Abrams, 544 U.S. 113 (2005) 11

Saylor v. Ridge, 989 F. Supp. 680 (E.D. Pa. 1998) 4

Sch. Dist. of Wis. Dells v. Z.S., 184 F. Supp. 2d. 860 (W.D. Wis. 2001), aff'd, 295 F.3d 671 (7th Cir. 2002) 8

Smith v. City of Philadelphia, 345 F. Supp. 2d 482 (E.D. Pa. 2004) 4

STATUTES

20 U.S.C. § 1400 et seq. 1

20 U.S.C. § 1415(1) 8, 9, 11

29 U.S.C. § 794 ..... 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11

42 U.S.C. § 1983 ..... 9, 11

42 U.S.C. § 12132 et seq. 1

42 U.S.C. § 12203 ... 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11

FURTHER REASONS FOR GRANTING THE WRIT

The Petitioners'[1] main brief focuses on their right, as parents, to advocate for their disabled children free from retaliatory and discriminatory conduct by the School District. Respondent's opposition brief ("Opp. Br.") ignores any reference to Petitioners' claims of such retaliatory-type conduct. Instead, Respondent focuses on the fact that the retaliatory conduct arose from the Parents' advocacy under IDEA in an effort to obscure the true nature of the Parents' claim for compensatory damages. The Respondent's suggestion that there was somehow a failure to exhaust administrative remedies similarly misses the point. The School District's failure to meet the Parents' arguments is fatal to the School District's opposition to the Parents' Petition.

---

[1] Petitioners Catherine Burke and Mikael Rolfhamre (the "Parents") are the parents of three children identified by the Brookline School District (the "School District") as students in need of special education under the Individuals with Disabilities Education Act ("IDEA") (20 U.S.C. § 1400 et seq.). Each of the children is also an individual with a disability under the Americans with Disabilities Act ("ADA") (42 U.S.C. § 12132 et seq.) and a handicapped person as defined by section 504 of the Rehabilitation Act of 1973 ("Section 504") (29 U.S.C. § 794).

Petitioners hereby reply to Respondent's opposition brief, pursuant to Rule 15.6.

I. THE SCHOOL DISTRICT'S OPPOSITION BRIEF IGNORES THE PARENTS' RETALIATORY CLAIMS BROUGHT UNDER SECTION 504 AND THE ADA.

The School District's principal argument – that the Parents' underlying claims represent an effort to "circumvent the established legal principle that damages are unavailable under the IDEA," Opp. Br. at 5 – is defeated by the School District's failure to account for the Petition's focus on retaliatory claims that sound under Section 504 and the ADA.

Petitioners' pro se complaint alleged, inter alia, that the School District discriminated, retaliated, interfered with, coerced, and intimidated Petitioners because of Petitioners' advocacy for their children. Petition at 5. While the complaint may have described the School District's violations of the IDEA, Opp. Br. at 5, the claim for compensatory damages is based on the School District's retaliatory conduct toward the Petitioners for which the Parents seek compensatory damages. Specifically, the complaint contains highly detailed allegations regarding the School District's activities against the Parents in response to their advocacy on behalf of their children. Both the Circuit Court and the District Court overlooked the essential nature of the complaint. With its Opposition Brief, the Respondent does the same.

II. PETITIONERS WERE NOT REQUIRED TO EXHAUST ADMINISTRATIVE REMEDIES.

A. Petitioners' Retaliatory Claims Under ADA and Section 504 do not Require Exhaustion of Administrative Remedies.

Because Petitioners are not bringing their claims under the IDEA, but rather under the ADA and Section 504, there is no exhaustion requirement.

Petitioners allege injuries under Title V of the ADA, which prohibits retaliation, interference, coercion, or intimidation. 42 U.S.C. § 12203. Petitioners allege that they suffered this discrimination because they opposed the unlawful actions taken by the School District. The harm of which the Petitioners complain is based on the acts covered by local government action and public accommodation provisions of the ADA, at Titles II and III. Such claims have no exhaustion requirements when they are brought as Title V retaliation actions. McInerney v. Rensselaer Polytechnic Inst., 505 F.3d 135, 138 (2d Cir. 2007) ("Accordingly, we hold that there is no administrative-exhaustion requirement for ADA Title III claims or Title V claims predicated on asserting one's rights under Title III."); Cable v. Dep't of Developmental Servs., 973 F. Supp. 937, 940 (C.D. Cal. 1997) ("Here, Plaintiff's Title V claims rely on acts and practices Plaintiff alleges were unlawful under Title II of the ADA. Thus, Plaintiff was not

required to exhaust administrative remedies before filing this action."), rev'd on other grounds, Cable v. Dep't of Developmental Servs., 54 Fed. Appx. 263, 264 (9th Cir. 2002). Therefore, exhaustion does not apply to Petitioners' ADA claim.

Section 504 of the Rehabilitation Act prohibits discrimination and exclusion from federally funded programs. 29 U.S.C. § 794. Petitioners' claim that the harassment, discrimination, and other actions carried out against them by the School District violated their civil rights under this Section. Section 504 does not impose an administrative exhaustion requirement on those who have been injured in this way. Smith v. City of Philadelphia, 345 F. Supp. 2d 482, 486 (E.D. Pa. 2004) ("Neither Title II of the ADA nor the Rehabilitation Act include a requirement that a plaintiff exhaust his or her administrative remedies before filing suit in federal court.") (citing and quoting Freed v. CONRAIL, 201 F.3d 188, 190 (3d Cir. 2000) (section 504 plaintiffs may proceed directly to court without pursuing administrative remedies); Saylor v. Ridge, 989 F. Supp. 680, 685-686 (E.D. Pa. 1998) (there is no requirement that administrative remedies first be exhausted before suit may be commenced)); see also Freed, 201 F.3d at 192 ("[W]e are presented with the narrow issue whether a plaintiff suing solely under section 504 must exhaust the Title VI administrative process before bringing suit against a private recipient of federal funds. We know of no precedent, in this court or elsewhere, that imposes such a requirement."); Pendleton v. Jefferson Local School Dist. Bd. of Educ., 1992 U.S. App. Lexis 6294 (6th

Cir. 1992) ("We agree with the district court's holding that the Rehabilitation Act does not require exhaustion of administrative remedies before bringing a civil action."); Adashunas v. Negley, 626 F.2d 600, 603 (7th Cir. 1980) ("[T]he Rehabilitation Act does provide the handicapped with affirmative rights, does create a private right of action and does not require exhaustion of administrative remedies.").

B. Because Petitioners' Retaliatory Claims were not FAPE-Based, They Were not Required to Exhaust Such Claims at the Administrative Level.

The Petitioners are not bringing their claims under the IDEA. They do not base their claims on a denial of FAPE, nor do they seek the kind of relief that could be granted through any IDEA administrative hearing. Therefore, there is no IDEA exhaustion requirement that applies to this action. M.T.V. v. DeKalb County Sch. Dist., 446 F.3d 1153, 1158 (11th Cir. 2006) ("As we have held, 'the exhaustion of ... administrative remedies is not required where resort to administrative remedies would be 1) futile or 2) inadequate.'") (quoting N.B. v. Alachua County Sch. Bd., 84 F.3d 1376, 1379 (11th Cir. 1996)).

Because the Parents' retaliatory claims under the ADA and Section 504 are not FAPE-based, they are outside of the scope of the IDEA and the Parents are not required to exhaust these claims administratively. See Padilla v. School Dist. No. 1, 233 F.3d 1268, 1274 (10th Cir. 2000) ("In essence, the

dispositive question generally is whether the plaintiff has alleged injuries that could be redressed to any degree by the IDEA's administrative procedures and remedies. [...] If not, the claim necessarily falls outside the IDEA's scope, and exhaustion is unnecessary.").

Petitioners have carefully followed the procedural requirements on their children's behalf in other administrative hearings not on appeal here (and in which, incidentally, the Respondent has never been finally adjudicated to have successfully satisfied FAPE requirements for the Petitioners' children). However, in this case there is no exhaustion requirement to satisfy.[2]

C. The Court Should Disregard The School District's Reference to the Administrative Record.

The Opposition Brief devotes considerable space to recounting prior judgments and prior administrative hearings which are not before this Court. Opp. Br. 1-4. The procedural muddle it conjures up has no bearing on the present case;

---

[2] Even assuming, arguendo, that exhaustion would apply to this case, the grant of certiorari would simply allow the case to proceed in the court below, where Respondent could raise exhaustion among its other defenses. Opp. Br. at 15 n. 6.

many of the cases and administrative hearings it mentions were adjudicated several years ago, some have long since been resolved, and others are currently pending before other courts[3] – but none are before this Court in this Petition and, more importantly, none concern the civil rights violations experienced by the Parents.

Even if the School District had provided FAPE to the Petitioners' children, (which the Respondent suggests and the Petitioners deny) this would have no affect on the viability of Petitioners' claims for retaliation under the ADA and Section 504. If the Petitioners had reached their objective in fulfilling their children's right to FAPE from the School District, the Parents' would still have a claim for compensatory damages based on retaliation and discrimination under the ADA and Section 504. The claims before this Court are for the harm suffered by the Parents because of the School District's retaliatory conduct in response to their advocacy. The claims are not predicated on the continued existence of FAPE deprivations. For this reason, even if the Respondent's assertion that the Parents

---

[3] The erroneous assertion that the Petitioners have not prevailed in any of the many administrative hearings they have sought in order to try to achieve FAPE for their three daughters, is not only completely irrelevant to the question before the Court, but also powerfully underscores the pervasive effort to discredit Petitioners for exercising their rights. Opp. Br. at 11.

were not "prevailing parties" in administrative proceedings were correct, Opp. Br. at 17, it would be of no consequence to the present Petition. The cases upon which Respondent relies for this proposition are inapplicable. See Opp. Br. at 18 (citing Sch. Dist. of Wis. Dells v. Z.S., 184 F. Supp. 2d. 860 (W.D. Wis. 2001), aff'd, 295 F.3d 671 (7th Cir. 2002) (barring Section 504 claims because they were brought by the student, not by the parents, and did not involve claims for retaliation)).

III. THE QUESTION BEFORE THIS COURT IS ONE OF PURE STATUTORY INTERPRETATION.

The procedural posture of this case allows this Court to address the Circuit split. Contrary to the Respondent's argument, the First Circuit ruling in Diaz-Fonseca v. Puerto Rico, 451 F.3d 13 (1st Cir. 2006) simply cannot be reconciled with the Ninth Circuit's ruling in Mark H. v. Lemahieu, 513 F.3d 922 (9th Cir. 2008). In Mark H., after explaining the distinct nature of Section 504 claims and IDEA claims as "overlapping but different," the Ninth Circuit unequivocally held that "Congress has clearly stated its intent to preserve all remedies under § 504 for acts that also violate the IDEA." Id. at 924. That Court noted the differences between Section 504 and IDEA throughout its substantial and well-reasoned opinion. See, e.g., id. at 929. ("While the IDEA focuses on the provision of appropriate education to disabled children, [Section 504 of] the Rehabilitation Act of 1973 more broadly addresses the provision of state services to disabled individuals.").

Mark H. squarely contravenes the central holding of Diaz-Fonseca when it states, "The district court held that the availability of relief under the IDEA precludes suits for damages under § 504 for government actions that violate both statutes. This conclusion was erroneous for two reasons." Id. at 932. The Ninth Circuit reaffirmed that the plain language of Section 1415(l) unequivocally provides for recovery and was passed by Congress as an explicit response to judicial interpretations prohibiting recovery under Section 504. The Respondent is asking this Court to resurrect that prohibition in this case. Id. at 934.

In Diaz-Fonseca, the First Circuit held, "that when the underlying claim is one of violation of the IDEA, plaintiffs may not use § 1983 – or any other federal statute for that matter – in an attempt to evade the limited remedial structure of the IDEA," and that Section 504 and ADA, "do not provide any broader remedies than those available under the IDEA." Diaz-Fonseca, 451 F.3d at 29, 30. Putting aside the fact that the Petitioners are not bringing any claim – 'underlying' or otherwise – under the IDEA or Section 1983, Respondent's assertion that this case is consonant with Mark H. is incorrect.

Respondent attempts to obscure this Circuit split by implying that the requirement of "independence" for Section 504 or ADA claims articulated by the Ninth Circuit in Mark H. has the same meaning as it does under Diaz-Fonseca in the First Circuit. Opp. Br. at 9. This is simply not true. Mark H. met the standard of "independence" even though, unlike the present case, it involved

claimants who brought *concurrent* Section 504 and IDEA claims premised on the *very same facts*. Mark H., 513 F.3d at 935. In Mark H., the complaint alleged that the Hawaii Department of Education's failure "to provide autism specific services to Natalie and Michelle during crucial years of ages three to seven through appropriately trained personnel and in appropriate classrooms was a violation of § 504 constituted deliberate indifference to the needs and rights of these children.'" Id. at 930. If the same standard of "independence" were recognized in both circuits, it would have been impossible for Diaz-Fonseca to have been the basis for upholding a dismissal of a complaint which did not plead IDEA violations and which clearly established claims for discrimination, retaliation, interference, coercion, and intimidation that are independent from classroom activities. This disparity among the circuits is at the center of the question presented by Petitioners.

Furthermore, this Court's ruling would prevent the implied repeal that Diaz-Fonseca has created. Petition at 20. Diaz-Fonseca's central holding that "where the essence of the claim is one stated under the IDEA for denial of FAPE, no greater remedies than those authorized under the IDEA are made available by recasting the claim as one brought under 42 U.S.C. § 1983, Title II of the ADA, or section 504 of the Rehabilitation Act," Diaz-Fonseca, 451 F.3d at 19, has had the practical effect of reading an implied repeal of the ADA and Section 504 into the IDEA. As such, the First Circuit overlooks the fact that the ADA was passed after the

IDEA. Further, such a reading would be prohibited by longstanding principles of statutory construction endorsed by this Court in Posadas v. National City Bank, 296 U.S. 497, 503 (1936) and recently reinforced in Rancho Palos Verdes v. Abrams, 544 U.S. 113 (2005). Those Courts hold that where, as in the cases of the ADA and Section 504, a later statute that "creates rights" overlaps with a former statute that supplies its own "private means of redress," implied repeal is untenable.

Unless this Court resolves the glaring conflict between the First Circuit and the intent of Congress, and rejects this implied repeal of Section of 1415(l), Diaz-Fonseca will allow school districts to retaliate against and otherwise harass parents of IDEA-disabled children with impunity, secure in the knowledge that they cannot – by law – be liable for damages.

CONCLUSION

Petitioners respectfully request that this Court grant their Petition for Writ of Certiorari to review the questions presented in this appeal.

Dated: June 3, 2008

Respectfully submitted,

NIXON PEABODY LLP

Jamie N. Hage, Esq.
Counsel of Record
100 Summer Street
Boston, Massachusetts 02110
(617) 345-1000
Attorney for Petitioners